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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TRUTH, an unincorporated association, et al.,

Petitioners,

v.

KENT SCHOOL DISTRICT, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Truth, a Christian student group, applied for charter club status at Kentridge High School in Respondent Kent School District to secure access to facilities, funding, and other benefits. Other non-curricular student groups enjoy this status at the school. Truth's application was denied, however, because its membership criteria require students to possess a true desire to study the Bible and grow in a relationship with Jesus Christ. While the school district generally allows chartered student clubs to maintain group identity and expression by limiting membership to those who adhere to the group's ideology, the district's nondiscrimination policy denies religious groups this same privilege. This petition presents the following questions:

1. Did the Ninth Circuit err in holding, in conflict with decisions of this Court and the Second Circuit, that schools could circumvent the basic protections of the Equal Access Act by excluding religious groups under a nondiscrimination policy?

2. Did the Ninth Circuit err in holding, in conflict with decisions of this Court and the Seventh and Eighth Circuits, that an infringement on expressive association triggers a deferential reasonableness standard, rather than strict scrutiny?

LIST OF PARTIES

Petitioners are Plaintiffs Truth, an unincorporated association, Sarice Undis, and Julianne Stewart. Respondents are Defendants Kent School District, Barbara Grohe, Superintendent of Kent School District, Mike Albrecht, Principal of Kentridge High School, and Eric Anderson, Vice Principal of Kentridge High School, in their official capacities.

CORPORATE DISCLOSURE STATEMENT

Petitioners state that they have no parent companies or non-wholly owned subsidiaries.

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DECISIONS BELOW

The district court's ruling granting summary judgment in respondents' favor is unreported and reprinted in Appendix (App.) 111a-147a. The initial Ninth Circuit panel opinion is reported at 499 F.3d 999 and reprinted in App 74a-110a. The substituted Ninth Circuit panel opinion is reported at 524 F.3d 957 and reprinted in App. 39a-73a. The amended Ninth Circuit panel opinion is reported at 542 F.3d 634 and reprinted in App 1a-38a. The order denying Truth's petition for rehearing en banc, and the accompanying opinions concurring and dissenting from the order, appear at 551 F.3d 850 and are reprinted in App. 148a-164a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its panel decision on August 24, 2007. The panel withdrew its judgment, entered its substituted judgment, and denied Truth's petition for rehearing and rehearing en banc as moot on April 25, 2008. The panel amended its judgment to add a two-judge concurrence on September 9, 2008. Truth's second petition for rehearing en banc was denied on December 22, 2008. Petitioners obtained an extension of time, up and until March 10, 2009, to file petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The text of the Equal Access Act, codified at 20 U.S.C. §§ 4071-4074, is set forth in App. 165a-170a.

STATEMENT OF THE CASE

A. Factual Background

In the fall of 2001, Sarice Undis and Julianne Stewart attended Kentridge High School in the Kent School District in the State of Washington. They resolved to start a Christian club named Truth and applied to the Associated Student Body (ASB) for charter club status. App. 3a-4a. Kent School District Policy 2153 allows non-ASB-chartered student groups to meet informally on campus before and after school, provided they secure principal's approval, but "[u]nchartered clubs are not permitted to exist" at the school. App. 3a, 9a-10a. Conversely, chartered groups receive a variety of benefits, including access to campus facilities for meetings during instructional time, access to school bulletin boards, and eligibility for funding from the ASB. App. 9a-10a. In addition to a number of curriculum-

related groups, the school grants charter club status to a broad range of non-curriculum clubs, including Gay-Straight Alliance, Girl's Honor, Men's Honor, Key Club, Multicultural Student Union, Future Business Leaders of America, National Honor Society, Snowriders, and Earth Corps. App. 11a-12a.

The ASB Council entertained Truth's charter application during a September 2001 meeting, and several students objected. In lieu of a vote, the Council abstained until they could consult with Assistant Principal Eric Anderson. Anderson brought the issue to Principal Mike Albrecht, and they, in turn, informed Undis that the school would need to confer with the District's attorney about the matter and inform her of the decision. App. 4a.

School officials did not act on Truth's charter application during the entirety of the 2001/2002 school year. Undis repeatedly asked Anderson – at least ten separate times – about the status of the charter, but on each occasion, Undis was told that no decision had been made. App. 4a.

The school also declined to take up Truth's charter application during the summer and fall of 2002. App. 4a. Following the Ninth Circuit's ruling in *Prince v. Jacoby* – a case where the Ninth Circuit upheld a Christian club's right to obtain ASB recognition – Truth's attorney, Robert Tyler, faxed a letter to Principal Albrecht, insisting that the school approve Truth's charter. The school did not approve the charter, but requested that Truth submit a new application. App. 5a.

Stewart promptly submitted another charter application for Truth. The second charter included voting membership, and required such members to "profess[] belief in the Bible and in Jesus Christ." It also required officers to "believe in and be committed to biblical principles." App. 5a.

Three more weeks passed with the school still not taking any action on Truth's charter. Tyler then sent another letter to the school, again demanding that the school approve Truth's charter. App. 6a.

Approximately one month later, the ASB Council discussed Truth's second charter. Some students balked at Truth's name, claiming that it "implies that every other religion at Kentridge is a lie." Others said that they believed approving the charter would violate principles of "[c]hurch and state" and that the voting membership should be open to all. The Council declined to take a vote on the charter. App. 6a.

The ASB Council met again on April 1, 2003 to consider the matter. Anderson was present and explained that the school would make the final decision on Truth's charter even if the ASB Council approved the application. If the Council denied the charter, Truth would have no right to exist on campus. Following these comments, the ASB Council voted to deny Truth's charter application. App. 6a.

Two days later, Truth, along with Undis and Stewart, filed this action, alleging violations of the Equal Access Act and the First and Fourteenth Amendments. App. 6a. The next week, on April 9,

Anderson delivered a letter to Stewart, inviting Truth to submit yet another charter to the ASB Council. App. 9a.

Stewart complied with the request. The third charter provided a more expansive description of Truth, expounding on the club's purpose: to "study the Bible and the Gospel of Christ and to associate with other believers in Christian fellowship wherein our faith may be expressed to those in the club as well as those outside of the club." The application set out that meetings are open to everyone, but a member must have "a true desire to study the Bible and grow in a relationship with Jesus Christ," and be willing to "comply[] in good faith and Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible." App. 7a. Voting members and officers are required to sign a statement of faith, stating that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God," that "salvation is an undeserved gift from God," and that only by "acceptance of Jesus Christ as [his or her] personal Savior, through His death on the cross for . . . sins, is . . . faith made real." App. 7a-8a.[1]

Truth crafted membership criteria to reflect their core beliefs. App. 174a. Through the criteria, Truth seeks to protect the group's purpose, identity, and expression, like many of the existing ASB-chartered student clubs at Kentridge, including:

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[1] Truth's third charter application, and accompanying constitution, is found at App. 173a-180a.

- Key Club, which requires members to be "interested in service, qualified scholastically, of good character, possessing leadership potential;"

- Earth Corps, whose members must have an "interest and dedication toward environmental issues;" and

- Gay-Straight Alliance, whose members "must be willing to work toward the goals of the club," which include "working to decrease homophobia" and fighting "heterosexism." App. 11a-12a.[2]

At its April 25 meeting, the ASB Council deliberated on Truth's third charter. The Council rehashed concerns about Truth's name, membership restrictions, and presence of a religious club at the school. In the end, the Council voted to deny the charter, listing four reasons for the decision: "Name," "Pledge to vote," "Segregating," and "Religious club in school." App. 8a.

In defending the Council's action, the District relies on its nondiscrimination policy. App. 9a. Kent District Policy 3210 states that the "district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color,

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[2] Earth Corps' charter application is found at App. 181a-183a and Gay-Straight Alliance's charter application and constitution is found at App. 184a-191a.

national origin, sex, . . . or physical, sensory or mental disabilities." App. 9a, 171a.[3] The District interprets "creed" to preclude religious student groups from establishing the same type of membership criteria that non-religious groups are allowed to adopt. App. 9a.

B. Proceedings Below

1. Cross-Motions for Summary Judgment and District Court Opinion

On cross-motions for summary judgment, the district court ruled in favor of the respondents. The court granted summary judgment on Truth's constitutional claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), concluding that the District took no action on Truth's charter. App. 121a-130a. Turning to the Equal Access Act, the court determined that Truth had not shown their "general membership policy is protected speech," triggering the Act's protection. App. 130a-135a. Then, going back to Truth's expressive association claim, the court offered an alternative holding. Pointing to this Court's expressive association cases, the court required the District to demonstrate that their interference with membership criteria furthered a "compelling state interest unrelated to

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[3] The District claims that this policy is derived from Washington's public accommodations nondiscrimination law, Wash. Rev. Code § 49.60.215 (West 2006) (prohibiting discrimination based on "race, creed, color, national origin, sexual orientation, sex, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person."). App. 10a-11a.

the suppression of ideas . . . [which] cannot be served through less restrictive means." App. 135a-147a. And, the court held that the District satisfied this stringent standard because its "compelling interest in preventing discrimination based on religion justifies intruding upon the Club's right to expressive association." App. 142a. The district court declined to evaluate Truth's remaining constitutional claims on the belief that they were all "subsumed" in Truth's expressive association argument. App. 147a.

2. Appeal and Ninth Circuit's Initial Opinion

The Ninth Circuit panel initially affirmed the decision of the district court, but on different grounds. At the outset, the panel dismissed the District's arguments on standing and ripeness, characterizing ASB's rejection of Truth's charter as a concrete injury-in-fact. App. 86a-91a. The panel elaborated that the injury is directly traceable to the District's nondiscrimination policy because the District had repeatedly rejected Truth's charter under its policy. App. 90a-91a. The panel also reversed the district court's *Monell* ruling, citing its previous decisions holding *Monell* inapplicable to claims for prospective relief. App. 91a-92a.

As for the merits, the panel first contemplated Truth's claim under the Equal Access Act. The panel noted the State's right to enact legislation prohibiting invidious discrimination. App. 92a-93a. And, for the balance of its analysis, the court focused on the phrase "content of the speech" found in the

Act. Construing this phrase to only prohibit restrictions that are facially content-based – and not indirect burdens on group speech – the panel upheld the District's nondiscrimination requirement as an appropriate "content-neutral" measure. App. 93a-100a. The Ninth Circuit did not recognize expressive association as a right protected by the Act or explain why Congress would enact a protection that is so easily evaded. In so holding, the Ninth Circuit conceded that it was "in some tension" with the Second Circuit's holding in *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996). App. 98a-99a.

The panel then affirmed the district court's ruling on Truth's expressive association argument, finding no burden on a "First Amendment interest." App. 100a-107a. The panel cited this Court's forced-inclusion cases and pegged strict scrutiny as the appropriate standard to apply, but upheld the restriction on Truth in the absence of a "First Amendment interest." App. 103a-106a. The Ninth Circuit panel also distinguished an analogous case decided in the Seventh Circuit after the appeal was filed, *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), on this same basis that it could find no "cognizable First Amendment interest." App. 107a.

3. First Petition for Rehearing and Rehearing En Banc and Ninth Circuit's Substituted Opinion

Truth timely filed a petition for rehearing and rehearing en banc. Challenging the ruling on the

Equal Access Act, Truth stressed the need for en banc consideration in light of the admitted "tension" between the panel decision and the Second Circuit in *Hsu*. Concerning the expressive association aspect of the decision, Truth cited pertinent decisions of this Court, including *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Healy v. James*, 408 U.S. 169 (1972), and pointed out the error in not finding a First Amendment interest at stake with intrusion on a group's membership. Truth also drew attention to the conflict with the Seventh Circuit's decision in *Walker*. Lastly, Truth demonstrated the panel's error in ignoring undisputed evidence about other groups obtaining exemptions from the nondiscrimination policy.

The Ninth Circuit panel then withdrew its initial opinion, issued a substituted opinion, and denied Truth's petition as moot. App. 39a-40a. The panel's analysis on the Equal Access Act remained virtually the same. App. 58a-67a. But, in the substituted opinion, the panel surmised that their holding regarding the Act "is [actually] not inconsistent" with *Hsu* after all. App. 65a. Regarding the expressive association claim, the Ninth Circuit altered its analysis dramatically. The panel jettisoned this Court's expressive association jurisprudence and the strict scrutiny standard attached to it. Instead, the court applied public forum analysis. Relying almost exclusively on *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and its free speech analysis, the Ninth Circuit characterized the school as a limited public forum and upheld the District's

nondiscrimination policy as a reasonable and viewpoint-neutral restriction. App. 67a-71a.

The panel further deduced that Truth raised a triable issue of fact about whether the District violated Truth's rights in granting certain clubs exemptions to the nondiscrimination policy, while refusing to do the same for Truth. It remanded the case for further proceedings on this limited factual issue. App 67a, 71a.[4]

4. Second Petition for Rehearing En Banc and Ninth Circuit Panel's Amended Opinion

Truth filed a second petition for rehearing en banc. In this second petition, Truth reiterated the conflict between the Ninth Circuit and the *Hsu* Court on the scope of the Equal Access Act, and emphasized the inappropriateness of using forum analysis for judging the expressive association claim.

Reacting to this petition, the panel amended its opinion -- adding a concurring opinion from Judges Fisher and Wardlaw. App. 35a-38a. The two-judge concurrence, which amounted to a majority opinion, attempted to "amplify" and defend the panel's abandonment of its initial expressive association analysis and delayed adoption of public forum analysis. App. 35a-36a. The majority concurrence stated that "[e]xpressive association is

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[4] In conjunction with the remand, the Ninth Circuit gratuitously offered its doubts about the continued viability of this claim. App. 67a.

simply another way of speaking," and when the state restricts access to a limited public forum in a way that interferes with a group's expressive association, "we apply the lesser standard of scrutiny." App. 37a. While recognizing governmental intrusion on membership as infringing on expressive association, the majority concurrence carved out a special exception for violations in a limited public forum. App. 36a-37a. The majority concurrence further tried to distinguish *Walker*, saying: "Although the Seventh Circuit applied strict scrutiny in addressing [the expressive association] claim, it notably stated that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum." App. 38a.

5. Ninth Circuit Denial of Rehearing En Banc with Dissenting and Concurring Opinions

With Judges Bea and O'Scannlain dissenting, the Ninth Circuit denied en banc review. App. 148a-164a. Writing for the dissent, Judge Bea explained that the "essential problem with the majority is that it applies a *Rosenberger* 'free speech' analysis (when the content of the speech is known and is outside a reasonably set topic area) to what is a *Dale* 'freedom of association' case (which deals with the formulation of the content of such speech)." App. 152a. He and Judge O'Scannlain observed that the panel's holding "flies directly in the face of Supreme Court precedent" by "telling [Truth] how its expression must be determined." App. 153a.

Elaborating on the prospect of an inter-circuit conflict, Judges Bea and O'Scannlain called attention to this Court's "clear mandate" to apply strict scrutiny to state intrusion on expressive association and the Seventh Circuit's adherence to this principle in *Walker*. App. 158a-162a. They also portrayed the panel's treatment of *Walker* as a "flat-out misrepresentation" because mention of forum in the *Walker* case referred to the free speech claim alone, not to the separate expressive association claim. App. 162a. Because *Walker* is "on all fours with our case," the dissent understood that the panel decision "clearly establishes a circuit conflict." App. 162a.

In a concurring opinion to the denial of rehearing en banc, Judges Fisher and Wardlaw reiterated their denial of a circuit split with *Walker*. App. 163a-164a.[5]

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for two distinct reasons.

First, this case presents an opportunity to resolve a critical issue that has divided the circuits about the scope and purposes of the Equal Access Act, specifically, whether the Act protects religious student groups' freedom to associate for expressive

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[5] Because the heart of the case – the Equal Access Act and expressive association claim – is subject to this Petition, the district court is staying the matter pending final decision of this Court.

reasons to the same degree as other non-curricular groups. The Act is intended to ensure that students engaging in religious expression have the same rights as other students to associate together and to speak. *Hsu*, 85 F.3d at 859. In refusing to recognize expression association as a freedom protected under the Act, the Ninth Circuit deviated from decisions of this Court and fundamentally undermined the basic purpose of the Act. If schools are free to discriminate against student religious groups because of their membership criteria, then the Act's protection against discrimination based on the religious nature of the speech would be a hollow guarantee. As a result, the decision clashes with the *Hsu* decision in the Second Circuit, and clarity is needed.

Second, this Court can resolve the conflict among the circuits on how to judge the propriety of infringement on a student religious group's expressive association. The Ninth Circuit's decision departs from the previously well-established principle of applying strict scrutiny to government regulations that coerce groups to accept members who would substantially alter their desired identity and message. *Dale*, 530 U.S. at 659; *Healy*, 408 U.S. at 181. The Ninth Circuit abandoned this Court's expressive association jurisprudence, and applied public forum doctrine instead, betraying the traditional meaning of associational freedom. The expressive association right is supposed to be "an indispensable means" of preserving many constitutional liberties, including the freedoms of speech, assembly, and petition. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). But, the Ninth Circuit's decision relegates the fundamental

guarantee to a superfluous notion that carries no independent significance, conflicting with decisions from the Seventh and Eighth Circuits.

I. THE NINTH CIRCUIT'S DECISION UNDERMINES THE PURPOSES OF THE EQUAL ACCESS ACT IN CONFLICT WITH DECISIONS OF THIS COURT AND THE SECOND CIRCUIT.

This Court, in *Widmar v. Vincent*, struck down a state university regulation that prohibited a student group from using school facilities for "religious worship or religious teaching." 454 U.S. 263, 265 (1981). After this decision, in 1984, Congress passed the Equal Access Act for the express purpose of providing the same protection to religious student groups in public secondary schools. *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 239 (1990). The Act makes it "unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a).[6]

The Ninth Circuit found no violation of the Equal Access Act on the theory that discrimination

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[6] The District falls under the constraints of the Act because it is a public secondary school, receives federal funding, and creates a limited open forum for non-curricular clubs. App. 26a.

against a religious club - because of the religious nature of the club's membership criteria - did not run afoul of the Act. In ruling against Truth on this issue, the Ninth Circuit does not appreciate expressive association as a component of the freedom protected by the Act. Nor does the court recognize membership criteria as being integrally related to content of speech, even though membership facilitates and furthers speech during group meetings. Rather, the Ninth Circuit construed the Act to proscribe only regulations that facially restrict content of speech.[7] This interpretation circumvents the basic protections of the Equal Access Act and allows state nondiscrimination policies to effectively preempt the Act.[8]

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[7] Finding expressive association uncovered by the Act, the Ninth Circuit marginalizes the import of it. Because thought precedes speech, government restrictions on what members of an association may or may not believe not only curtails the content in a given meeting, but also on a group's identity.

[8] The Ninth Circuit defends the existence of nondiscrimination policies on the footing that "States have the constitutional authority to enact legislation prohibiting invidious discrimination." App. 21a. But while this much is correct, nondiscrimination policies cannot be used in a way that frustrates the objective of the Equal Access Act. *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (3d Cir. 1993). Moreover, there is nothing "invidious" about a religious group defining itself through shared beliefs because "religious discrimination by a religious group is 'vital' to the group's religious mission ...." *Hsu*, 85 F.3d at 869. The Constitution protects the rights of religious groups to select members who agree with their beliefs. *See, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-40 (1987) (upholding exemption for religious organizations from Title VII ban on religious discrimination). For this reason, virtually all nondiscrimination laws, including Title VII (42 U.S.C. § 2000e-1(a)) and Washington's

The Ninth Circuit presents a remarkably narrow reading of the Act. *See* Jonathan Duncan, *The Equal Access Act: From Clear to Complicated in One Case*, 231 ED. LAW REP. 7, 11 (2008) ("The decision in *Truth* was surprising because it interpreted the Act's protections more narrowly than previous decisions by federal courts."). Dating back to its inspiration in *Widmar*, the Equal Access Act has always contemplated expressive association as an integral part of the assurances afforded. In *Widmar*, this Court expressly held that the challenged university policy infringed on the group's right to associate, as well as right to speech. 454 U.S. at 268-69.

Indeed, the whole focus of the Act is to protect a religious group's right to associate free from discrimination, as reflected in the text itself. The Act guarantees "equal access" of student groups, their freedom from "discrimination," as well as "a fair opportunity" to meet on the same basis as other groups. App. 165a. To be sure, the Act speaks to the "content of the speech at ... meetings," but that phrase cannot be read in isolation to deny any effective protection to religious groups who wish to control the content of speech at meetings by adopting certain membership criteria.

"[I]n expounding a statute, [courts] must not be guided by a single sentence or member of a

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employment non-discrimination law (Wash. Rev. Code § 49.60.040(3)), allow religious organizations to discriminate on the basis of religion.

sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (citation omitted). This axiom is particularly pertinent to the Equal Access Act, which is intended to be interpreted "broadly" to protect the rights of student religious groups. *Mergens*, 496 U.S. at 239. In lieu of interpreting the Act broadly, the Ninth Circuit exalted a restrictive reading of the phrase "content of the speech" over everything else in and about the Act.[9]

Legislative history confirms that the Act protects expressive association. The Senate Report declares up front that the Act's purpose is to "clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students." S. Rep. No. 98-357, at 3 (1984). The Act's "Legal Authority" section denotes that "the right of individuals to associate to further their personal beliefs" is among students' First Amendment rights, and that the "primary impediment to free association" is the "denial of use of campus facilities for meetings and other appropriate purposes." *Id.* at 23-24.

Dispensing with the aim of the Equal Access Act, the Ninth Circuit diverges from the Second

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[9] The Ninth Circuit strained to parcel out expressive association from the term "speech." Ironically, in conflating free speech and expressive association on the First Amendment issue, the majority concurrence even acknowledged: "Expressive association is simply another way of speaking...." App. 37a.

Circuit's interpretation of the legislation. The Second Circuit, in *Hsu*, concludes in contrast that the Act offers protection for free association. 85 F.3d at 859. The *Hsu* Court reasoned: "The Act's authors made it clear that the language of [the Equal Access Act] was intended to protect both free speech and free association rights of certain student clubs." *Id.* (citation of legislative history omitted).

In the face of this contrary analysis, the Ninth Circuit proclaimed that its decision "is not inconsistent" with *Hsu* because the Second Circuit "focused on the term 'speech' in the Act rather than the content-neutrality (or lack thereof) of school policies." App. 27a. But, this is to explain the conflict, not to erase it.[10] While the Second Circuit looked at the term "speech" in the Act and read it to include freedom of association, the Ninth Circuit interpreted the term only to concern verbal expression. *See* Charles Morris, *Association Speaks*

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[10] Also, the Ninth Circuit tried in vain to distinguish *Hsu* on the basis that the Second Circuit dealt with leaders, not general membership. App. 27a-28a. This factual difference is meaningless because the nondiscrimination policy in *Hsu*, and its application to leaders, survives under the rationale of the Ninth Circuit. Not only does the Ninth Circuit fail to include expressive association in its understanding of "speech," it does not even think that the Act can apply to nondiscrimination policies. *See* Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 906-07 (2009) (In commenting on the conflict between *Hsu* and *Truth*, Dean Howarth points out that "the Second Circuit in *Hsu* was divided in how far to extend the exclusionary rights of the Christian student club Walking on Water, but the Ninth Circuit panel rejected any basis for the Christian student club Truth to exclude non-Christians.")

Louder Than Words: Reaffirming Students' Right to Expressive Association, 19 GEO. MASON U. CIV. RTS. L.J. 193, 212 (2008) ("...the Ninth Circuit reasoned that the Equal Access Act protected only the content of verbal speech in school meetings. By so holding, the court deliberately eviscerated Truth's associational rights.")[11]

If the authors of the Act intended to do anything at all, they "sought to end discrimination against religious extracurricular groups in public schools by mandating a policy of neutrality." *Hsu*, 85 F.3d at 854. Truth is deprived of this key freedom because it is not permitted to limit its membership to those who subscribe to the group's principles. No other group in the District is inhibited in this manner. Earth Corps, for example, can associate according to ideology, restricting membership only to those students who adhere to the group's viewpoints about the environment. App. 11a, 181a-183a. Gay-Straight Alliance likewise can and does limit membership to students who share in the group's beliefs about and commitment to homosexual issues. App. 11a-12a, 184-191a. Truth is not treated the same as these and other groups simply because Truth's organizing principles are religious in nature. App. 173a-180a.

The Ninth Circuit recognized that other clubs in the District premise their membership on ideology, but reasoned that "nothing in the District's

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[11] The Ninth Circuit was more candid about the conflict with *Hsu* in its initial opinion: "Our reasoning is in some tension with that of the Second Circuit ...." App. 98a-99a.

non-discrimination policy prohibits discrimination on the basis of *political* belief." App. 66a. (emphasis added). This merely restates the existence of discrimination. In other words, non-religious groups are free to limit membership to adherents in ways that further the mission and resulting speech of the group, while religious groups are denied this right. But even if the policy was uniform in application, "exemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express, may be required if a school is to provide 'equal access.'" *Hsu*, 85 F.3d at 860. *See also Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 57 (2006) (explaining that the Solomon Amendment "looks to the *result* achieved" by a school's recruiting policy; applying the policy uniformly is "insufficient to comply with the statute if it results in a greater level of access for other recruiters than for the military.").

The disparate treatment from which Truth suffers is precisely what the Act is intended to alleviate: "To the Act's authors, 'equal access' meant that 'secondary school students engaging in religious speech have *the same rights* to associate together and to speak as do students who wish to meet to discuss chess, politics, or philosophy.'" *Hsu*, 85 F.3d 854 (citation omitted).

In sum, the Ninth Circuit's holding betrays Equal Access Act's explicit purpose of ensuring "equal access" for religious groups. Reading the Act narrowly, so as to strip it of protection for students' free association, the Ninth Circuit has disregarded

the legislative purpose and the text of the Act, as well as this Court's guidance on the Act, and has effectively created a "[c]onflict between federal appellate courts [that] presents an opportunity for Supreme Court intervention." Duncan, *supra*, at 11.

II. THE NINTH CIRCUIT'S DECISION RUNS AFOUL OF THIS COURT'S EXPRESSIVE ASSOCIATION CASES AND CREATES A CONFLICT AMONG THE CIRCUITS.

In the initial paragraph of the decision below, the Ninth Circuit observed that Truth's legal claims include, among other things, "violations of ... the First Amendment rights of free speech and expressive association." App. 3a. Despite the recognition of two distinct claims, the Ninth Circuit went on to mix up the two in its analysis, using forum analysis to judge the entirety of the matter.[12] This approach is deeply flawed. The holding runs counter to this Court's precedent and the Seventh and Eighth Circuits' interpretation of the precedent.

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[12] The panel's analysis is puzzling, particularly, in light of its prior decision, *Truth v. Kent School District*, 499 F.3d 999 (9th Cir. 2007) (withdrawn). At that juncture, the panel recognized Truth's right to expressive association as a distinct First Amendment claim and analyzed the claim under this Court's expressive association cases. App. 100a-107a. The panel made various and critical mistakes in that portion of the opinion, and Truth enumerated these errors in the first petition for rehearing en banc. But instead of correcting the errors, the Panel abandoned the expressive association analysis altogether. *Cf.* App. 30a-38a.

A. The Ninth Circuit Wrongly Applied Forum Analysis to Truth's Expressive Association Claim.

The freedom to associate – and the corresponding right *not* to associate – is implicit in the First Amendment freedoms of speech, assembly, and petition. *Roberts*, 468 U.S. at 622. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* And, importantly, the associational right encompasses the autonomy to define and control group membership. *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981).

This Court, in *Dale*, confirmed the proper analysis for evaluating governmental intrusion on a group's membership. The right of expressive association is implicated if a group "engage[s] in some form of expression, whether it be public or private," and the forced inclusion "would significantly affect the [group's] ability to advocate public or private viewpoints." 530 U.S. at 648, 650. Such intrusions are only permissible if the government can prove they are "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623).

This Court noted that the Boy Scouts' mission is to instill values in young people, both expressly and by example. *Id.* at 649-50. Two principle values were living "morally straight" and "clean," and the Scouts viewed homosexual behavior to be inconsistent with those values. *Id.* at 650. Emphasizing that "deference [must be given] to an association's view of what would impair its expression," this Court held that Dale's forced presence in the Scouts would require it "to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653. And, because the state was unable to muster a compelling reason for interference with the Scouts' expressive association, the restriction was struck down as unconstitutional. *Id.* at 659.

The same concerns are present here. Truth's general membership criteria are intimately tied to the fundamental purpose of the organization and its expression. Allowing those who lack desire to have a relationship with Jesus Christ, or who openly flaunt their disdain for the Bible's instruction on conduct, to become and hold out themselves as members, would significantly undercut the core message Truth is seeking to convey inside and outside of its group.

Thus, "*Dale* is not only illuminating, it is determinative of this case." App. 153a (Bea, J., dissenting). Strict scrutiny – the test used in *Dale* – should apply to the restriction on Truth. *Dale* is just the latest in a long line of this Court's opinions holding that regulations affecting a group's ability to associate or disassociate must survive strict

scrutiny. *See, e.g., Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (inquiring whether the State has a compelling interest that would justify its intrusion on a Rotary Club's membership criteria); *Roberts*, 468 U.S. at 623 (explaining that infringements on the right to expressive association must "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"); *Democratic Party*, 450 U.S. at 124-25 (holding that the state did not provide a compelling interest to justify intruding on the Democratic Party's right to expressive association).

Instead of following (or even citing) *Dale*, the Ninth Circuit upheld the nondiscrimination policy as "viewpoint neutral and reasonable in light of the purposes of the forum." App. 31a. So holding, the Ninth Circuit placed much emphasis on the fact that the District does not keep Truth from existing as a Policy 2153 group before or after school.[13] But the nature of the burden does not alter the analysis for expressive association. In addition to precluding direct interference with a group's membership, the guarantee also serves to keep the government from penalizing or burdening the right to expressive association. *Healy*, 408 U.S. at 183.

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[13] In blocking ASB status, the District denies Truth the opportunity to meet during school. The District further denies Truth funding, chance to advertise, recognition in yearbook, and access to public address system.

In *Healy*, a state university provided official recognition to student groups, which allowed them to meet on campus and make announcements through university channels like newspapers and bulletin boards. 408 U.S. at 176. The university refused to officially recognize a chapter of the Students for a Democratic Society, citing a conflict between the group's philosophy and university policy. *Id.* at 174-76.

This Court upheld the students' expressive association challenge, underscoring the protection afforded against even "indirect" interference with fundamental rights. *Id.* at 183. "There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right," regardless of the group's ability to exist outside of the campus community. *Id.* at 181. As a "form of prior restraint," the university bore a "heavy burden" to justify the appropriateness of its restriction—a burden it failed to meet. *Id.* at 184.[14]

Healy is controlling here. Both schools opened forums providing official recognition for student clubs and granting access to facilities, channels of communications on campus, and funding. Truth is excluded from the forum, like the club in *Healy*,

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[14] This Court empathized with the school's need to impose reasonable regulations for maintaining order and preventing material disruptions in the educational environment, but noted a difference between advocacy, which is fully protected, and action, which is not. *Id.* at 192. Here, the District has not even suggested that Truth could disrupt the educational environment.

because its association is contrary to school policy. Truth, too, could use alternate locations and modes for communication, but this does not "ameliorate significantly the disabilities imposed" by the school's action. *Id.* at 183.

As with *Dale*, the Ninth Circuit missed the instruction of *Healy*. The Ninth Circuit dismissed this Court's holding as irrelevant because, in its view, the District has only opened a limited public forum.[15] The Ninth Circuit mistakenly relied on forum analysis for assessing Truth's expressive association claim.

The Ninth Circuit's novel analysis robs expressive association of its independent force and any true meaning. This Court has consistently recognized that the freedom to associate is not only an important component of speech, but is the linchpin in preserving other cherished liberties as

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[15] In the two-judge majority concurrence of the amended opinion, Judges Fisher and Wardlaw wrote separately to "amplify" their thinking on this particular issue. They cited *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995) for the right to expressive association in a traditional public forum and cited *Healy* for the same right in what they depicted as a "general public forum." App. 35a-38a. The court drew the line there, though, requiring different treatment for expressive association in a limited public forum. This differentiation finds no support in this Court's jurisprudence. While *Hurley* did concern a parade on a public street, this Court's ruling did not turn on forum status. *Hurley*, 515 U.S. at 573-81. And this Court made no mention of "general public forum" or even forum analysis in *Healy*. Regardless, from a pure factual standpoint, the forum in *Healy* is no more "general" than the forum in this case, as both involve denial of access via school policy.

well. The right has firm constitutional roots in multiple clauses, including the freedoms of assembly and petition, in addition to speech. *Healy*, 408 U.S. at 181. And, it is "an indispensable means" of preserving each of these liberties. *Roberts*, 468 U.S. at 618. The freedom of association serves a distinct, elemental constitutional purpose and must be evaluated under its own constitutional standards.

Forum analysis is often appropriate for free speech claims, though sometimes difficult to apply, but there is no justification for transplanting the doctrine to expressive association rights. With expressive association, forum is not even a relevant consideration. An imposition on a group's expressive association goes beyond any particular venue and attacks its identity.[16] The District's nondiscrimination requirement does not merely affect Truth's speech within the confines of the school; it follows Truth wherever it goes. Truth is thus forced into an untenable dilemma: either abandon its religious identity to be a full participant of campus life or accept second-class status at the price of religious identity. In either instance, Truth cannot function as the group it is designed to be.[17]

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[16] It would make no sense to exclude organized churches from limited public forums because their membership criteria discriminate on the basis of religion, and yet, this is the impact of the Ninth Circuit's decision.

[17] Dean Howarth, in her thorough treatment on the issue, speaks to the irony of nondiscrimination policies in this context.

> Equality and nondiscrimination are too precious to be reduced to the silly formalities of insisting that faith-based organizations cannot discriminate on the basis of faith. We

B. The Ninth Circuit conflicts with Seventh Circuit and Eighth Circuit on the Proper Framework for Analyzing Expressive Association Claims.

The Ninth Circuit's decision also "clearly establishes a circuit conflict." App. 162a (Bea J., dissenting).

First, the Seventh Circuit's decision in *Christian Legal Society v. Walker* is "on all fours with our case." App. 162a (Bea J., dissenting). *Walker* involved a public law school that offered official recognition to student groups. As here, recognition provided groups access to various channels of communication on campus, the ability to reserve meeting space, and funding from the school. *Walker*, 453 F.3d at 857. The school revoked the official status of the Christian Legal Society (CLS), however, because it required members to subscribe to a statement of faith – a violation of the school's nondiscrimination requirement for student clubs. *Id.* at 858. CLS could still meet on campus, but it did not have access to any of the other benefits afforded officially recognized groups. *Id.*

> do not really expect student organizations to ignore their defining purposes in selecting members and officers, and the pretense that we do is causing an unnecessary and harmful battle that pits equality for LGBT people against First Amendment rights of students.

Howarth, *supra*, at 923-24.

CLS challenged the revocation as violating its rights of expressive association and free speech. The Seventh Circuit analyzed these two claims separately. Relying on *Dale* and *Healy*, it applied strict scrutiny to the expressive association claim. *Id.* at 861-64. It then applied forum analysis to the free speech claim. *Id.* at 865-67.

The Seventh Circuit concluded that CLS engages in expressive activity, highlighting that CLS, much like Truth, is a "group of people bound together by their shared Christian faith and a commitment to showing the love of Christ to the campus community and the community at large by proclaiming the gospel in word and deed." *Id.* at 862 (quotation marks omitted). The court then asked whether forced inclusion of those who did not share its beliefs would affect CLS's message. "To ask this question is very nearly to answer it," it concluded. *Id.* Using as an example CLS's belief that sexual conduct outside of a traditional marriage is immoral, the Seventh Circuit found that it would be "difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id.* at 863.

The university in *Walker* argued that the *Dale* standard was inapplicable because it was merely excluding CLS from a forum, not imposing a prohibition on CLS's membership criteria. But the Seventh Circuit disagreed, finding that this Court in *Healy* had already rejected the argument, and confirmed that the university "may not do indirectly

what it is constitutionally prohibited from doing directly." *Id.* at 864. (citing *Healy*, 408 U.S. at 183).

Although the Ninth Circuit here acknowledged that the *Walker* court applied strict scrutiny to an expressive association claim, it deemed *Walker* distinguishable because "[*Walker*] notably stated that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum." App. 38a. But the Ninth Circuit misreads (and, as a result, misrepresents) *Walker*. The Seventh Circuit invoked forum analysis for evaluating CLS's free speech claim after it already had concluded that CLS was likely to succeed on its expressive association claim. Walker, 453 F.3d at 865. The mention of a forum in a separate section of the opinion does not erase the conflict with *Walker*.[18]

The logic of the Ninth Circuit is also at odds with the Eighth Circuit's decision in *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000). There, the Eighth Circuit declined to apply forum analysis to an expressive association claim, even though the issue concerned access to a limited public forum. In *Cuffley*, a state refused to allow the Ku Klux Klan to participate in its Adopt-A-Highway program because the Klan's membership criteria discriminate on the basis of race, religion, color, and national origin. *Id.* at 705. The Eighth Circuit saw "little question that

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[18] As described by Judges Bea and O'Scannlain, this attempt to distinguish *Walker* "is not only a *non sequitur* because the two claims [free speech and expressive association] are distinct; it is a flat-out misrepresentation." App. 161a-162a.

requiring the Klan to accept non-'Aryans' would significantly interfere with the Klan's message," citing several of this Court's expressive association cases. *Id.* at 708. The court held that the state "cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association." *Id.* at 709. The Eighth Circuit thus applied expressive association standards, not forum analysis, contrary to the Ninth Circuit's decision here.

This conflict among the circuits warrants resolution by this Court. There exists a disparity in the basic legal framework used to decide the fundamental constitutional freedom of expressive association.

CONCLUSION

For the foregoing reasons, this Court should grant Truth's petition for writ of certiorari.

Respectfully Submitted,

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APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRUTH, an unincorporated association; SARICE UNDIS, a minor, by and through her father, LARRY UNDIS; JULIANNE STEWART, a minor, by and through her parents, PAUL and ANNA STEWART,
Plaintiffs-Appellants,
v.
KENT SCHOOL DISTRICT; BARBARA GROHE, Superintendent of Kent School District; MIKE ALBRECHT, Principal of Kentridge High School; ERIC ANDERSON, Assistant Principal of Kentridge High School, in their official capacities,
Defendants-Appellees.

No. 04-35876

D.C. No. CV-03-00785-MJP

AMENDING OPINION ONLY TO INCLUDE CONCURRENCE

Appeal from the United States District Court for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted
July 27, 2006—Seattle, Washington

Filed April 25, 2008
Amended September 9, 2008

Before: J. Clifford Wallace, Kim McLane Wardlaw, and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Wallace; Concurrence by Judge Fisher

COUNSEL

Nathan W. Kellum, Alliance Defense Fund, Memphis, Tennessee, for the plaintiffs-appellants.

Michael B. Tierney, Mercer Island, Washington, for the defendants-appellees.

Jane M. Whicher, Port Townsend, Washington, for amicus American Civil Liberties Union.

Sara J. Rose, Washington, D.C., for amicus Americans United for Separation of Church and State.

David F. McDowell, Los Angeles, California, for amicus Anti-Defamation League.

ORDER

The opinion filed on April 25, 2008 in the above-captioned case is amended only to include the concurrence filed this date.

Appellant's Petition for Rehearing En Banc is still pending.

OPINION

WALLACE, Circuit Judge:

Appellants Truth, Sarice Undis, and Julianne Stewart (collectively, Truth) appeal from a summary judgment in favor of the Kent School District and other appellees (collectively, District). Truth alleges violations of the Equal Access Act (the Act), the First Amendment rights of free speech and expressive association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse and remand.

I.

This appeal arises from Truth's attempt to form a student club at Kentridge High School (Kentridge), which is part of the Kent School District. Under the relevant policies at Kentridge, "[u]nchartered clubs are not permitted to exist." To obtain a charter, students must submit a proposed charter to the Associated Student Body (ASB) Council and secure approval.

Beginning in the fall semester of 2001, appellants Undis, then a junior, and Stewart, then a sophomore, attempted to form a Bible club at Kentridge. Undis and Stewart submitted a "Club Charter Application" (first charter) for official

recognition as an ASB organization in September 2001. This first charter indicated that the club's name was to be "Truth" and that the purpose of the organization was to "have a Bible study to encourage and help become better people with good morals." Under the section "Membership Criteria," the first charter indicated that the group was to be "[o]pen to anyone." The charter also proposed that it would designate a "quote of the week for announcement" and "once a month decorate [the] school with a theme."

The ASB Council discussed Truth's first charter at a September 2001 meeting, and several students objected to chartering Truth. The ASB Council decided to consult with the Assistant Principal, appellee Eric Anderson. Anderson and appellee Mike Albrecht, Principal of Kentridge, later told Undis that they would speak with the school's attorney regarding the legality of granting Truth ASB recognition. Albrecht stated that "the problem with the September 2001 proposal was that it involved broadcasting a weekly Bible quote over the school's public address system and monthly decoration of the school in a biblical theme."

No action was taken on the first charter for the remainder of the 2001-02 school year. During that time, Undis asked Anderson to make a decision on Truth's application on at least ten occasions, to no avail. Sometime in the spring semester of 2002, all ASB clubs were instructed to resubmit their charters. The record does not reveal any further activity on Truth's application during the summer and fall semesters of 2002.

During this period, we decided *Prince v. Jacoby*, which involved a request by a Bible club for ASB recognition in a different Washington school district. 303 F.3d 1074 (9th Cir. 2002). On January 7, 2003, an attorney for Truth, Robert Tyler, wrote to Albrecht stating that it was "constitutionally imperative that [Kentridge] grant [appellants'] proposed Bible Club treatment and rights equal to all other noncurriculum clubs." The letter also insisted that Kentridge "immediately adhere to the requirements of the Equal Access Act and the First Amendment," and threatened litigation if Kentridge did not comply.

On January 30, 2003, Tyler sent a second letter to Michael Harrington, counsel for the Kent School District. Tyler requested the forms required to establish an ASB club, and threatened litigation if Truth's charter was not approved by February 4.

On February 2, as requested by Anderson, Undis and Stewart submitted a new application (second charter). The second charter removed the quote-of-the-week and monthly theme decoration provisions of the first charter. The club's stated purpose was now to "provid[e] a biblically-based club for those students interested in growing in their relationship with Jesus Christ." Although membership would be open to all students, the second charter restricted voting membership to "members professing belief in the Bible and in Jesus Christ." Officers would also be required to "believe in and be committed to biblical principles."

After a third letter to Harrington from Tyler, the second charter was discussed at an ASB Council meeting on March 27. Some students expressed disapproval of the club's name, suggesting that it "implies that every other religion at Kentridge is a lie." Some council members also expressed concerns that granting the charter would violate "[c]hurch and state" and that the voting membership should be open to everyone. Additionally, members suggested that students could go to "Young Life," a non-ASB recognized organization that met on Kentridge's campus after school hours. The minutes of the March 27 meeting reveal that the question of whether to approve the second charter was discussed for twenty minutes. No vote was taken.

The second charter was next addressed at an ASB Council meeting on April 1. After a brief clarification on the role of the advisor for the club, the minutes show that Anderson stated that if the ASB Council voted to approve the charter, he would consult the District's attorneys and Kentridge would make a final decision on approving the charter. The Counsel voted eleven to six against approval of Truth's second charter.

On April 3, Truth filed a complaint in the United States District Court for the Western District of Washington, alleging that defendants had violated the Act, as well as the First Amendment rights of free speech and expressive association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. Truth sought injunctive and declaratory relief as well as nominal damages.

On April 9, Anderson sent Stewart a letter informing her of her right to resubmit Truth's application for ASB club recognition: "As was discussed at the ASB meeting on March 28th, by making minor changes to Article[s] I and III of the proposed Constitution for your club, you will address the points raised." Article I sets forth the name of the club and Article III contains the voting membership and officer restrictions. Anderson advised Stewart to "be prepared to resubmit by the April 25th ASB Meeting." Under the Kentridge ASB Constitution, "[a]ny rejected charters must be resubmitted within two weeks of rejection with the required changes made or the charter shall be permanently rejected."

Stewart and Undis submitted the third charter on April 24. The third charter maintains the proposed name "Truth." However, it divides the membership into three categories: voting members, non-voting members, and attendees. Meetings are open to everyone. But the "privilege of membership is contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible." The charter application also lists a "true desire to . . . grow in a relation-ship with Jesus Christ" under the "Membership Criteria" heading. In order to be a voting member or officer, students are required to sign a "statement of faith." The statement of faith requires the person to affirm that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God." A voting member must also pledge that he or she believes "that salvation is

an undeserved gift from God," and that only by "acceptance of Jesus Christ as my personal Savior, through His death on the cross for my sins, is my faith made real." Other than the ability to call oneself a "member," there is no difference between the rights of non-voting members and attendees.

The third charter was discussed at the April 25 ASB Council meeting. The ASB Council again objected to the name, selectivity provisions, and the presence of religion in school. The council voted nineteen to zero to deny approval of the charter, with one member undecided. The minutes give four reasons why the charter was not accepted: 1) "Name," 2) "Pledge to vote," 3) "Segregating," 4) "Religious club in school."

On May 6, Tyler wrote to the Kent School District's counsel stating that it was his "understanding from the ASB Constitution that this rejection by the ASB is the final decision." The letter also provided that Tyler "was unable to locate any rights to appeal the decision of the ASB," but that if there were "a right to appeal the decision of the ASB," he asked that the letter "serve as a formal request for appeal."

Anderson advised Undis and Stewart in a May 12 letter "that pursuant to Kent School District Policy 2340, [they had] the ability to discuss this matter with Mr. Albrecht," and mentioned the possibility of discussions with the District superintendent or the ombudservices office. Although Tyler's May 6 letter would appear to have invoked these processes, no further action was taken by the District. Policy 2340

concerns "religious related activities or practices." The policy does not refer to ASB recognition, and the ASB Constitution does not refer to this policy as providing an avenue for an appeal of the District's decisions, which are otherwise "final."

Although Undis and Stewart have both graduated from Kentridge, they have indicated that another student, Lindsay Thomas, is prepared to assume leadership of the club if the charter is approved.

The Kent School District has three policies relevant to this appeal. First, Policy 3210 provides that "[t]he district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color, national origin, sex, marital status, previous arrest . . . , incarceration, or physical, sensory or mental disabilities." The district court held that inclusion of "creed" indicates that discrimination based upon religion is prohibited. That ruling has not been challenged on appeal.

Second, Policy 2153 provides for "noncurriculum-related, non ASB student groups," which groups the principal shall approve provided they meet several additional requirements, such as that they do not disrupt the school environment. While Policy 2153 groups may meet on school grounds before or after school, these groups do not receive other benefits accorded only to ASB-sponsored student clubs. Most significantly, only ASB-chartered groups may receive ASB funding and engage in purchasing through the

Kent School District Finance Department. Each ASB club is provided with a faculty advisor or adult advisor designee, who must be present at all club meetings and assists in the planning and handling of the club's affairs. ASB clubs are also allowed to conduct meetings during noninstructional time, advertise their activities in school, use the public address system, and are recognized in the school yearbook. The District states that Truth "is free to operate as a private Policy 2153 group," but argues that Truth was properly denied ASB recognition.

Third, Policy 2340P regulates "religious related activities or practices," and provides guidelines for schools addressing religious holidays, symbols, ceremonies, topics, activities, and beliefs. This policy also provides that "[s]tudents, parents, and employees who are aggrieved by practices or activities conducted in the school or district may seek resolution of their concern first with the building principal, then with the district superintendent or designee, or use ombudservices, which is available through the Legal Services Department."

Washington State also has a relevant non-discrimination law, which the District relies on to justify its denial of ASB recognition for Truth. In 2003, Washington Revised Code § 49.60.215 (West 2006) provided that:

> It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, . . .

> or the refusing or withholding from any person the admission, patron-age, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person.

The District has argued that these non-discrimination policies require it to deny ASB recognition to Truth.

As of April 3, 2003, there were thirty ASB-recognized clubs at Kentridge. While the record does not contain the charters of all the clubs, it appears that many of them have selective membership criteria. Indeed, each charter application contains a section for "Membership Criteria."

The EarthCorps, for example, requires members to show "interest and dedication toward environmental issues." Similarly, the Key Club requires that members be "interested in service, qualified scholastically, of good character, possessing leadership potential . . . [and] willing to perform at least fifty hours of . . . service." The Gay-Straight Alliance requires that students "must be willing to work towards the goals of the club" to be members. These goals include "bring[ing] GLBTQ [Gay, Lesbian, Bisexual, Transgendered, and Questioning]

issues into the open, while working to decrease homophobia." Other goals include "changing stereotypes" and "fight[ing] heterosexism and other forms of oppression." The National Honor Society selects its members based on "outstanding scholarship, character, leadership, and service," and requires them to "behave in a courteous and respectful manner, refraining from language and actions that might bring discredit upon themselves." It also requires members to refrain from using or possessing alcohol or illegal substances. Participation in school sports requires maintaining a certain grade point average and attendance record, not using drugs or alcohol, and complying with the "sports code." Finally, a Men's Honor Club and a Girl's Honor Club also operate at Kentridge as ASB-recognized groups. Each club has gender-exclusive membership.

The district court entered summary judgment on all of Truth's claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), with the exception of the Act claim. The court held that the requirements of municipal liability under 42 U.S.C. § 1983 were not satisfied, and therefore entered summary judgment in favor of the District. It also held that the actions against the individual defendants in their official capacities were functionally equivalent to suits directly against the municipality, and therefore Truth's claims against them failed.

The district court ruled on the merits of the Act and some of the First Amendment claims, addressing the latter as an alternate holding if its

Monell ruling were to be reversed. It held that the restrictions on general membership in the third charter constituted a legitimate basis for denying the third charter and that these claims therefore failed.

The district court did not rule on the remaining claims based on its belief that "Plaintiffs' cursory Equal Protection Clause, Establishment Clause, and Free Exercise Clause arguments are all subsumed within their First Amendment argument." The district court also did not address the District's argument that granting ASB recognition to Truth would violate the Establishment Clause.

On appeal, both sides agree that only the third charter is before us. Truth makes this concession even though this action was filed before the third charter and its complaint only addresses the denial of its second charter.

This appeal requires us to review many determinations by the district court. As to each issue, we review de novo. We review a district court's summary judgment de novo. *See Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). In deter-mining whether summary judgment was appropriate, we view the evidence in the light most favorable to Truth, the nonmoving party. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). "We may affirm on any ground supported by the record." *Id.* We also review de novo the district court's *Monell* rulings, *see Doe v. Lebbos*, 348 F.3d 820, 825 (9th Cir. 2003), its "decision regarding the scope of a constitutional right," *see United States v. Napier*, 436 F.3d 1133, 1135-36 (9th Cir. 2006), and

its interpretation of the Act, *see SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003).

II.

Before addressing the merits, we consider our jurisdiction. The District argues that Truth lacks standing under *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983), because Truth has failed to meet the "likelihood of recurrence" requirement. The District asserts that Truth "cannot say the ASB or the District will always deny another Club application or even the same application."

[1] In order to establish Article III standing,

> a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000). Although the District has not made any arguments regarding these specific factors, we have an independent obligation to address whether we have subject-matter jurisdiction. *See Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999). "[A]t the summary judgment stage the plaintiffs need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing

elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

[2] With respect to injunctive relief, the Supreme Court has also required that a plaintiff show that "he is realistically threatened by a repetition of [the violation]." *Lyons*, 461 U.S. at 109. "The plaintiff need only establish that there is a reasonable expectation that his conduct will recur, triggering the alleged harm; he need not show that such recurrence is probable." *Jones v. City of Los Angeles*, 444 F.3d 1118, 1127 (9th Cir. 2006), *citing Honig v. Doe*, 484 U.S. 305, 318 & n.6 (1988). While we have extended this requirement to declaratory relief, *see Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006), it does not apply to monetary damages, *see Lyons*, 461 U.S. at 105. The District's standing argument therefore does not implicate Truth's standing to seek nominal damages.

The District asserts that the Establishment Clause, state law, and its own non-discrimination policies mandate that it deny ASB recognition to Truth. If the District believes that three independent and binding legal authorities compel it to deny Truth's application, we do not see how the District might approve the same or a similar charter request in the future.

[3] The District's written non-discrimination policies also support Truth's standing arguments. We have held that plain-tiffs "may demonstrate that an injury is likely to recur by showing that the defendant had . . . a written policy, and that the injury 'stems from' that policy. Where the harm

alleged is directly traceable to a written policy there is an implicit likelihood of its repetition in the immediate future." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004) (internal quotations and alterations omitted). Here, the harm is traceable to the District's policies, which the District has argued compel it to deny ASB recognition to Truth.

Additionally, despite Tyler's request that the District treat his letter as a "formal request for appeal," the District took no action. This is evidence that another charter request is likely to meet the same fate as the previous three. Finally, the District has provided nothing beyond its own speculation that the outcome might be different if Truth submitted a fourth charter. The legal positions it has taken in this litigation strongly suggest that no similar applications will ever be approved.

[4] Under these circumstances, we conclude that Truth has established at least a genuine issue of material fact as to whether there is a reasonable expectation that the alleged injury will recur. Therefore, Truth has standing to seek each of its requested forms of relief.

The District also suggests that this dispute is not ripe for review, and that we thus lack jurisdiction, because Truth did not bring the dispute to the Kent School District Board or Superintendent through Policy 2340P. The District is wrong. The Supreme Court has explicitly held that exhaustion is not required for claims brought under 42 U.S.C. § 1983. *See Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974).

Exhaustion cannot be dispositive under a ripeness analysis; otherwise ripeness doctrine would impose a *de facto* exhaustion requirement, in violation of *Steffel*. Thus, the alleged failure to exhaust administrative remedies may be at most only a factor in the ripeness analysis.

[5] Nevertheless, it appears that Truth did exhaust the formal appeal system. Tyler's May 6 letter to the District's counsel asked that the letter "serve as a formal request for appeal." The District has not provided any reason why this notification was not sufficient to trigger its appeals process, and no reason is apparent in the record. The District's failure to take any action as a result of this request does not indicate that Truth failed to bring the matter to the attention of the District. Under these circumstances, there is at least a genuine issue of material fact as to whether Truth exhausted the District's grievance procedures.

Nearly every other factor suggests that this case is ripe for decision. Under the Kentridge ASB Constitution, "[a]ny rejected charters must be resubmitted within two weeks of rejection with the required changes made or the charter shall be permanently rejected." The ASB Constitution neither pro-vides for any additional review, nor suggests that the ASB Council's decision lacked finality.

Furthermore, there is no doubt that the effects of the denial of Truth's charter have been felt in a concrete way by the appellants. Truth's members have experienced three denials of their applications,

as well as protracted delays in obtaining any action from the ASB Council and District. The harm that Truth has complained of does not "rest[ ] upon contingent future events" or ones that "may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation omitted). Instead, Truth complains of discrete events that have already occurred.

[6] Finally, "in evaluating ripeness, courts assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 779-80 (9th Cir. 2000) (internal quotation omitted). We conclude the hardship to Truth in denying adjudication outweighs the hardship to the District in deciding this appeal. Truth's application for ASB recognition languished for nearly sixteen months without any significant action being taken, and the ASB process appears to have stalled until Truth obtained counsel and threatened to sue. More than five years have passed since the submission of the first charter, and declining to decide this appeal now would present a significant hardship to appellants.

[7] By contrast, the hardship to the District is significantly less severe. The District has been aware of Truth's arguments for a long time and has had ample opportunity to take corrective action or change its policies, if it so desired. Its legal positions on appeal show that it does not believe any remedial action is appropriate and that it believes the denial of ASB recognition was proper. We therefore conclude that this case is ripe for decision.

III.

[8] We must also consider the district court's ruling that the requirements of *Monell* are not met. *Monell* permits section 1983 actions against municipalities, but requires plaintiffs to show that their injuries resulted from "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. *Monell*'s requirements do not apply where the plaintiffs only seek prospective relief, which is the case here. *See Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989). The District acknowledges the con-trolling effect of *Chaloux*, but argues that it should be overruled because it "rests on shaky grounds."

[9] It is well established in our circuit that while

> a three judge panel normally cannot overrule a decision of a prior panel on a controlling question of law, we may overrule prior circuit authority without taking the case en banc when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.

Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002) (internal citation and quotations omitted). The District argues that two Supreme Court cases, *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), and *McMillian v. Monroe County*, 520 U.S. 781 (1997), show that the "Supreme Court has re-emphasized

the importance and vitality of the doctrine that requires a municipal policy as a precondition to a lawsuit under § 1983." Neither of these cases addresses whether *Monell* applies to actions only seeking prospective relief. We have no authority to overrule *Chaloux*. *Chaloux* applies, and the district court's *Monell* ruling is reversed.

IV.

Relying on its non-discrimination policies, the District points to three aspects of Truth's third charter that justify its decision to deny the club ASB recognition: 1) the general membership restrictions, 2) the leadership and voting membership restrictions, and 3) the name "Truth." The district court granted summary judgment based only on the first justification, and explicitly declined to reach the other two. Accordingly, we too limit our analysis to the general membership restrictions. So long as the District had at least one permissible basis for rejecting Truth's charter, the district court properly granted summary judgment, and we need not address the District's remaining justifications.

We begin our analysis by considering whether the District violated the Act. If we determine that it did not, we then move on to consider whether the District's actions ran afoul of the First Amendment. *See Prince v. Jacoby*, 303 F.3d 1074, 1077 (9th Cir. 2002) ("We consider each of Prince's access claims separately, first under the Act, and then the First Amendment, to the extent we find them outside the scope of the Act").

A.

[10] States have the constitutional authority to enact legislation prohibiting invidious discrimination. *See Roberts v. United States Jaycees*, 468 U.S. 609, 624-26 (1984) (reviewing the history of state anti-discrimination laws and observing that a "State enjoys broad authority to create rights of public access on behalf of its citizens"). Truth asserts that it does not discriminate based on religion in violation of the plain language of the District's policies, but rather imposes a code of conduct not unlike those of other approved ASB clubs. Even assuming that non-Christians would be able to comply with Truth's view of "Christian character, Christian speech, Christian behavior and Christian conduct," we hold that the requirement that members possess a "true desire to . . . grow in a relationship with Jesus Christ" inherently excludes non-Christians.

[11] Having determined that the third charter violates the District's non-discrimination policies, we are led to hold that the District's denial of ASB recognition on this account would be consistent with the Act. The Act requires federally-funded schools that have created a limited open forum to grant religious clubs benefits and privileges afforded to all other non-curriculum clubs. *See Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 235-36 (1990); *Prince*, 303 F.3d at 1081 ("[T]he term 'equal access' means what the Supreme Court said in *Widmar* [*v. Vincent*, 454 U.S. 263, 267-71 (1981)]: religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities . . ."). *Prince* held

that the rights protected under the Act include equal access to some of the benefits associated with ASB status, including ASB funding and public communication techniques. 303 F.3d at 1084-90. The District does not argue that it is not required under the Act to provide equal access to the ASB program.

In interpreting the Act, we begin with its plain language. "Where the intent of Congress has been expressed in reason-ably plain terms, that language must ordinarily be regarded as conclusive." *Id.* at 1079 (internal quotations and citation omitted). Where there may be uncertainty, however, we rely on the Supreme Court's direction that the Act is to be "interpreted broadly," *Mergens*, 496 U.S. at 239, as well as cases deciding analogous issues under the First Amendment. *Cf. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 855-56 (2d Cir. 1996) (adopting similar approach).

[12] By its plain terms, the Act prevents only denials of access or fair opportunity or discrimination "on the basis of the religious, political, philosophical, or other content of the speech at [a club's] meetings." 20 U.S.C. § 4071(a). Therefore, once it is established that the secondary school receives federal funds and has created a limited open forum, the club must demonstrate two additional elements to prevail: 1) a denial of equal access, or fair opportunity, or discrimination; 2) that is based on the "content of the speech" at its meetings.

[13] The District denied Truth ASB status, at least in part, based on its discriminatory membership

criteria, not the religious "content of the speech."[1] The Act does not define "con-tent of the speech," but that phrase has a particular meaning in First Amendment jurisprudence. We have held that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) (quotations and citation omitted). Similarly, a "restriction on expressive activity is content-neutral if it is... based on a nonpretextual reason divorced from the content of the message attempted to be conveyed." *Id.* (quotations and citation omitted).

The Act, through which Congress extended the reasoning of the Supreme Court's 1981 decision in *Widmar v. Vincent* to secondary schools, *see Mergens*, 496 U.S. at 235, tracks *Widmar*'s emphasis on discrimination based on the content of the plaintiff's speech. *Widmar* struck down a state university's regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching." 454 U.S. 263, 265 (1981). *Widmar* thus precluded a university's "discriminatory exclusion from a public forum based on the religious content of a group's intended

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[1] Although the District gave several reasons for denying Truth's charter, some of which appear to have been based on the content of Truth's speech, the district court based its analysis only on the group's discriminatory membership policies. Therefore, we too limit our analysis to this issue when determining whether the district court's summary judgment was appropriate.

speech," *id.* at 269-70, but not its "right to exclude . . . First Amendment activities that violate reasonable campus rules." *Id.* at 277. Likewise, the Act prevents a school's unreasonable limitation on the conduct of a club to the extent the limitation is justified with reference to the expressive content of the regulated conduct. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech" (internal quotations and citation omitted)).

[14] Congress could have written the Act to protect religious clubs against a burden on their speech or activities, but did not. For example, when Congress passed the Religious Land Use and Institutionalized Persons Act, it not only prohibited discrimination against religious groups as such but also limited governments' abilities to impose even neutral, nondiscriminatory policies against them:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the bur-den on that person, assembly, or institution—
>
> > (A) is in furtherance of a compelling governmental interest; and

> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). Thus, Congress knows how to draft a statute placing otherwise content-neutral laws of general applicability that incidentally burden a First Amendment activity under the same judicial scrutiny as laws specifically targeting the religious content of a group's expression. *See Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 985-86 (9th Cir. 2006). That is not the case here. The Act clearly allows exclusions that are not "content"-based.

[15] The Act's legislative history strengthens our conclusion that it prohibits only content-based restrictions on religious groups. The legislative history focuses on Congress's intent to end school districts' previous practices of treating religious groups inequitably and forbidding them from meeting on campus. *See* S. Rep. 98-357, at 6, 1984 U.S.C.C.A.N. 2348, 2352 (1984) ("Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an [e]xtracurricular activity"); *id.* at 15, 1984 U.S.C.C.A.N. at 2361 ("[S]chool authorities across the country are banishing religious clubs from campus or placing such onerous restrictions on them that meetings become almost impossible"). The Senate Report recognized the possibility that religious groups like Truth might claim that content neutral policies regulating club membership violate the Act, and disclaimed any such intent:

> At the same time, the guarantee of equal access does not require special treatment for religious groups. Religious groups are accorded only the same rights and privileges as are granted to other student groups. In practice, however, this means that not all student groups would receive exactly the same privileges. There could be many neutral and impartial time, place, and manner restrictions placed on the use of school facilities which might produce situations in which some voluntary groups would not receive precisely the same access received by others. . . . The access determination could not be made, however, on the basis that the nature of the activity was religious.

Id. at 39, 1984 U.S.C.C.A.N. at 2385. The District's non-discrimination policies are not time, place or manner restrictions. But like such restrictions, the policies are content-neutral. This strongly suggests that Congress did not intend the Act to apply to non-discrimination policies.

[16] The parties do not dispute that the Kent School District receives federal funding, or that Kentridge has created a limited open forum for extracurricular student groups. The District contests, however, whether the Act's guarantee of equal access, fair opportunity, and non-discrimination protects Truth's freedom to exclude those who do not share Christian values from its general membership. On their face, the District's non-discrimination policies do not preclude or discriminate against religious speech. Truth also has

not shown that the District justifies its non-discrimination policies with reference to the content of a message Truth's discriminatory conduct may attempt to convey. The policies are content-neutral. Therefore, to the extent they proscribe Truth's discriminatory general membership restrictions, the policies do not implicate any rights that Truth might enjoy under the Act. *Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (holding that a statute or regulation that conditions government benefits on a non-discriminatory campus access policy is properly categorized as conduct, not speech).

Our decision is not inconsistent with that of the Second Circuit, which has focused on the term "speech" in the Act rather than the content-neutrality (or lack thereof) of school policies. *See Hsu*, 85 F.3d at 856 (rejecting argument that Act was not implicated because "the School did not base its qualified recognition of the Club on what would be said at the Club meetings, but on what could be characterized as the Club's 'act' of excluding non-Christians from leadership"); *id.* at 859 (Act triggered "when an after-school religious club excludes people of other religions from conducting its meetings . . . to protect the expressive content of the meetings"). The court's decision in *Hsu* is readily distinguishable from the case at hand. In *Hsu*, a Christian group was seeking to impose a religious test for all of its *leadership* positions. *Id.* at 849. The court held that the group's ability to exclude non-Christians from some, but not all, of these leadership positions constituted "speech" within the meaning of the Act. *Id.* at 858. In contrast, we are only

concerned with Truth's *general* membership requirements. The Second Circuit's decision in *Hsu* directly supports our holding with respect to these requirements. The court held that "a religious test for membership or attendance" would be "plainly insupportable," since "[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech." *Id.* at 858 & n.17.

[17] In short, Truth has not shown that the District's non-discrimination policy restricts ASB status on the basis of religion or the religious content of speech. Truth also argues, however, that the District violated the Act by allowing certain groups an *exemption* from the non-discrimination policy. Here we understand Truth to be challenging an allegedly arbitrary or discriminatory practice of granting waivers to non-religious groups, but not religious groups. This challenge is different in kind from one asserting that the application of the non-discrimination policy to Truth violates Truth's rights under the Act. If indeed the District has a policy of enforcing the non-discrimination policy only against religious groups, this policy would of course violate the Act. Many of the so-called 'exemptions' that Truth contests are in fact consistent with the District's non-discrimination policy. For example, several clubs, such as the EarthCorps and the Gay-Straight Alliance, require their members to support a specific political cause, but nothing in the District's non-discrimination policy prohibits discrimination on the basis of political belief. However, at least two groups, the Men's Honor Club and the Girl's Honor Club, were granted ASB recognition even though

their membership is based on gender, a protected ground under the District's policy. There is no evidence in the record as to why these groups were allowed apparent waivers from the District's non-discrimination policy. Thus, to the extent Truth alleges that the District provided waivers to these groups while denying them to others, and that decision was made on the basis of religion or the religious content of speech, Truth has raised a triable issue of fact.[2]

Therefore, we reverse the district court's summary judgment and remand for further proceedings on this limited issue.

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[2] Although Truth has raised a triable issue of fact, we call attention to two potential problems with its argument. First, Congress has specifically allowed for "separate but equal" gender discrimination in the context of school and youth activities. *See* 20 U.S.C. § 1681(a)(6) (providing that gender discrimination is allowed with regard to certain social fraternities and sororities and volunteer youth organizations that have traditionally been limited to one sex). Therefore, that the District exempts the Men's and Girl's Honor Clubs from its overarching gender discrimination policy does not, by itself, suggest an arbitrary or discriminatory application of that policy so as to violate the Act. Second, another high school and a junior high school in the District have granted ASB recognition to other Bible groups that do not discriminate in their membership criteria, making it even less likely that the District's application of its anti-discrimination policy in this case was merely a pretext for religious animus. Nevertheless, because the record is devoid of any evidence as to the actual reason that the District granted a non discrimination waiver to the Men's and Girl's Honor Clubs, we must remand for further proceedings.

B.

[18] We next address whether, and if so how, the First Amendment may apply where a school denies ASB recognition to a student club based on its membership criteria. As an initial matter, it is important to emphasize that the members of Truth are not seeking merely to associate as a group; they are seeking to associate as a *school-sponsored* group. Specifically, ASB recognition would give Truth access to ASB funds, additional access to the school's property and facilities, and special rights to post materials around the school. Therefore, we must evaluate the District's denial of ASB recognition as a restriction on a "limited public forum." *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (applying limited public forum analysis to religious group's request for student activities funds); *see also Prince*, 303 F.3d at 1091 (holding that a school, through its ASB program, "created a limited public forum"). The limited public forum framework "has been the source of much confusion" and the precise contours of the term "have not always been clear." *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (internal quotations and citation omitted). The Supreme Court first addressed the concept, indirectly, in *Widmar*. The Court recognized that, although the state is not required to open certain fora to public discourse, once it elects to do so, it "assume[s] an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267-68. Two years later, in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 44-45 (1983), the Supreme Court

clarified that there are three categories of government-run fora. "At one end of the spectrum are streets and parks which have immemorially been held in trust for the use of the public." *Id.* at 45 (internal quotations omitted). On the opposite end of the spectrum are those government properties that have not been traditionally considered open to the public. *Id.* at 46. Finally, falling somewhere in between are limited public fora, which "consist[ ] of public property which the state has opened for use by the public as a place for expressive activity." *Id.* at 45.

[19] In *Rosenberger*, the Supreme Court held that the government may exclude speech in a "limited public forum," so long as its reasons for doing so are viewpoint neutral and "reasonable in light of the purpose served by the forum." 515 U.S. at 829 (quotations and citation omitted). Access to ASB recognition qualifies as a limited public forum. *See Prince*, 303 F.3d at 1091. Therefore, we must consider whether the District's policy of restricting access to the ASB forum based on compliance with its non-discrimination policy is viewpoint neutral and reasonable in light of the purposes of the forum.

[20] The ASB Constitution makes it clear that the purpose of the organization "is to develop attitudes of and practice in good citizenship within the school; to promote harmonious relations between students, clubs, and activities; and to act as a forum for student and faculty expression." The constitution further states that this purpose will be carried out by "[h]elping the student body develop a regard for law and order by obeying, honoring, and sustaining

the laws of Washington State and King County, as well as the rules of Kentridge Senior High School. . . ." These broad statements of purpose show that the purpose of the ASB program is to advance the school's basic pedagogical goals. The Supreme Court has emphasized that part of a school's mission is to instill in students the "shared values of a civilized social order," which includes instilling the value of non-discrimination. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). Therefore, the District's decision to restrict access to the ASB program based on a group's willingness to adhere to the school's non-discrimination policy is reasonable in light of the purposes of the forum.

Because this policy was reasonable in light of the purposes served by the ASB, we must next consider whether the group's exclusion was viewpoint neutral. The Supreme Court has explained that "[v]iewpoint discrimination is . . . an egregious form of content discrimination," and occurs when "the specific motivating ideology or the opinion or perspective of the speaker is the *rationale* for the restriction." *Rosenberger*, 515 U.S. at 829 (emphasis added); *see also Perry Educ. Ass'n*, 460 U.S. at 46 (regulation on access to a forum is not viewpoint neutral if it is "an effort to suppress expression merely because public officials oppose the speaker's view"). In cases where restriction to the forum is based solely on the group's religious viewpoint, the restriction is invalid. This was the case in *Prince*, where the school refused to recognize the school group World Changers "based purely on the [group's] religious viewpoint." 303 F.3d at 1091.

[21] Here, in contrast, the school is not denying Truth access based solely on its religious viewpoint, but rather on its refusal to comply with the District's non-discrimination policy. The District was therefore not engaging in viewpoint discrimination; the "perspective of the speaker" was not the "rationale" for denying Truth access to the limited public forum. *See Rosenberger*, 515 U.S. at 829. Applying the non-discrimination policy to exclude Truth does not show that the school administrators acted "merely because [they] oppose the speaker's view." *Perry*, 460 U.S. at 46. In short, the District no more engaged in viewpoint discrimination by excluding Truth for refusing to comply with its non-discrimination policy than it would have engaged in viewpoint discrimination by refusing to grant ASB status to a Student Pro-Drug Club that refused to obey the school's anti drug policy. *Cf. Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007) (holding that schools may censor even *private* student speech that occurs on school grounds that "they reasonably regard as promoting illegal drug use").

[22] This conclusion, of course, rests on the premise that the ASB actually denied Truth's recognition based on its failure to comply with the District's non-discrimination policy. There is evidence in the record that other groups, such as the Men's and Girl's Honor Clubs, were granted ASB recognition despite violating the District's non-discrimination policy. Therefore, to the extent Truth argues that it was denied an *exemption* from the non-discrimination policy based on the content of its speech, we hold it has raised a triable issue of fact, and reverse the district court's summary judgment.

V.

[23] Truth also makes a claim under the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. The district court did not explicitly reach these claims, on the grounds that Truth's "cursory Equal Protection Clause, Establishment Clause, and Free Exercise arguments are all subsumed within their First Amendment argument . . . ." On appeal, Truth continues to give cursory treatment to these claims. Nevertheless, Truth may have a valid argument. As discussed earlier, we are remanding to the district court to determine whether Truth was denied an exemption from the District's non-discrimination policy, and whether that denial was based on religion or the content of Truth's speech. To the extent Truth can make out a colorable First Amendment violation on these grounds, it may also have a Free Exercise claim, since "the Supreme Court noted that free exercise claims implicating other constitutional protections, such as free speech, could qualify for strict scrutiny review . . . ." *Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002). Moreover, if Truth can demonstrate that it was singled out for unequal treatment on the basis of religion, it may also have a potentially valid Equal Protection or Establishment Clause argument. Therefore, we remand these issues to the district court to be considered along with the exemption issue discussed previously. Finally, the District has argued that the ASB has free speech rights that would be violated if it were compelled to recognize Truth as an ASB organization. The ASB is not a party to this appeal and there is no indication that

the District has authorization from the ASB to assert any such First Amendment claims. We conclude that the District lacks prudential standing to assert the ASB's free speech rights. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("[A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (quotations and citation omitted)).

VI.

It is prudent to address only those issues necessary for our decision on the third charter application. We hold only that the District did not violate the Act or Truth's First Amendment rights by applying its non-discrimination policy to require Truth to remove its general membership provision. To the extent Truth alleges that the District violated the Act or the First Amendment by refusing to provide an exemption to its non-discrimination policy—based on Truth's religion or the content of its speech—we reverse the district court's summary judgment, and remand for further proceedings.

REVERSED AND REMANDED.

FISHER, Circuit Judge, concurring, joined by Judge WARDLAW:

We write separately to amplify on one issue discussed in our main opinion. Truth argued that it must be granted access to the ASB forum because

conditioning its access to the ASB program on a change to its discriminatory membership policy would infringe its right to engage in speech through "expressive association." Expressive association may be burdened when the state requires a group to change its membership criteria, *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), or when the state conditions access to a traditional public forum upon such changes, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). When the use of school facilities is part of a general public forum, denying access to those facilities may also implicate the right to associate freely. *See Healy v. James*, 408 U.S. 169, 180-81 (1972) (noting that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas' " and that the complete "denial of use of campus facilities for meetings and other appropriate purposes" implicated a group's right to expressive association).

Even assuming, however, that Truth's exclusion of non-Christians allows it to engage in speech through expressive association, its exclusion from the ASB program on account of its discriminatory policy does not infringe its rights under the First Amendment. As our opinion explains, when the state creates a *limited* public forum, like the ASB program at issue here, it may restrict access to that forum so long as the restrictions are "viewpoint neutral and reasonable in light of the purpose served by the forum," even if these rules have the effect of limiting a group's ability to engage in protected speech, such as the right to speak, publish on a particular topic or

engage in expressive association. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for *certain groups* or for the discussion of certain topics." (emphasis added)).

We reject Truth's suggestion that state action that burdens a group's ability to engage in expressive association must always be subject to strict scrutiny, even if the group seeks to engage in expressive association through a limited public forum. Expressive association is simply another way of speaking, only the group communicates its message through the *act of associating* instead of through an act of "pure speech" such as publishing, marching, speaking or performing. *See Dale*, 530 U.S. at 648 (holding that the First Amendment protects a group's ability to exclude members, if including such members would "impair the ability of the group to express those views, and only those views, that it intends to express"). There is no question that acts of expressive association are protected forms of speech under the First Amendment. *See id.* at 656; *Hurley*, 515 U.S. at 579. When the state *restricts access to a limited public forum* in a way that interferes with a group's speech or expressive association, however, we apply the lesser standard of scrutiny, even if the same burden on a group's rights *outside* a limited public forum would be subject to strict scrutiny. *See Rosenberger*, 515 U.S. at 829-30 (applying limited public forum analysis to a university policy that excluded a group's access to the school's student activity fund, thereby preventing it from publishing

a newspaper). To hold otherwise would accord an act of "pure speech" such as publishing a newspaper — the core of what the First Amendment protects — less protection than an act of expressive association. We find no support for such a proposition, and Truth has identified none.[3] Truth, of course, has the option of operating as a Policy 2153 group on school grounds, *see* 524 F.3d at 963, and as such would be able to restrict its membership unfettered by the school's non-discrimination policy. If Truth wants the additional benefits that come from participation in the ASB program, however, Truth must comply with the school's reasonable, viewpoint-neutral rules.

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[3] In *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006), the Seventh Circuit reversed the denial of a preliminary injunction, holding that a university group had shown that it was "reasonably likely to succeed on the merits" of its First Amendment claim after being excluded from campus for violating the school's nondiscrimination policy, which the group claimed infringed its right to expressive association. Although the Seventh Circuit applied strict scrutiny in addressing this claim, it notably stated that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum. *See id.* at 866 ("Whether SIU's student organization forum is a public, designated public, or nonpublic forum is an inquiry that will require further factual development, and that is a task properly left for the district court.") *Walker* did not say that strict scrutiny would be appropriate in *all* cases, even if the university had created something less than an open forum

FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRUTH, an unincorporated association; SARICE UNDIS, a minor, by and through her father, LARRY UNDIS; JULIANNE STEWART, a minor, by and through her parents, PAUL and ANNA STEWART,

Plaintiffs-Appellants,

v.

KENT SCHOOL DISTRICT; BARBARA GROHE, Superintendent of Kent School District; MIKE ALBRECHT, Principal of Kentridge High School; ERIC ANDERSON, Assistant Principal of Kentridge High School, in their official capacities,

Defendants-Appellees.

No. 04-35876

D.C. No. CV-03-00785-MJP

ORDER AND OPINION

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted
July 27, 2006—Seattle, Washington

Filed April 25, 2008
Before: J. Clifford Wallace, Kim McLane Wardlaw, and

Raymond C. Fisher, Circuit Judges.

Opinion by Judge Wallace

COUNSEL

Robert H. Tyler, Alliance Defense Fund, Murrieta, California, for the plaintiffs-appellants.

Michael B. Tierney, Mercer Island, Washington, for the defendants-appellees.

Jane M. Whicher, Port Townsend, Washington, for amicus American Civil Liberties Union.

Sara J. Rose, Washington, D.C., for amicus Americans United for Separation of Church and State.

David F. McDowell, Los Angeles, California, for amicus Anti-Defamation League.

ORDER

The opinion filed on August 24, 2007 is hereby withdrawn and replaced by this concurrently filed opinion. The petition for rehearing en banc is denied as moot.

OPINION

WALLACE, Circuit Judge:

Appellants Truth, Sarice Undis, and Julianne Stewart (collectively, Truth) appeal from a summary judgment in favor of the Kent School District and other appellees (collectively, District). Truth alleges violations of the Equal Access Act (the Act), the First Amendment rights of free speech and expressive association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse and remand.

I.

This appeal arises from Truth's attempt to form a student club at Kentridge High School (Kentridge), which is part of the Kent School District. Under the relevant policies at Kentridge, "[u]nchartered clubs are not permitted to exist." To obtain a charter, students must submit a proposed charter to the Associated Student Body (ASB) Council and secure approval.

Beginning in the fall semester of 2001, appellants Undis, then a junior, and Stewart, then a sophomore, attempted to form a Bible club at Kentridge. Undis and Stewart submitted a "Club Charter Application" (first charter) for official recognition as an ASB organization in September 2001. This first charter indicated that the club's name was to be "Truth" and that the purpose of the organization was to "have a Bible study to encourage and help become better people with good morals."

Under the section "Membership Criteria," the first charter indicated that the group was to be "[o]pen to anyone." The charter also proposed that it would designate a "quote of the week for announcement" and "once a month decorate [the] school with a theme."

The ASB Council discussed Truth's first charter at a September 2001 meeting, and several students objected to chartering Truth. The ASB Council decided to consult with the Assistant Principal, appellee Eric Anderson. Anderson and appellee Mike Albrecht, Principal of Kentridge, later told Undis that they would speak with the school's attorney regarding the legality of granting Truth ASB recognition. Albrecht stated that "the problem with the September 2001 proposal was that it involved broadcasting a weekly Bible quote over the school's public address system and monthly decoration of the school in a biblical theme."

No action was taken on the first charter for the remainder of the 2001-02 school year. During that time, Undis asked Anderson to make a decision on Truth's application on at least ten occasions, to no avail. Sometime in the spring semester of 2002, all ASB clubs were instructed to resubmit their charters. The record does not reveal any further activity on Truth's application during the summer and fall semesters of 2002.

During this period, we decided *Prince v. Jacoby*, which involved a request by a Bible club for ASB recognition in a different Washington school district. 303 F.3d 1074 (9th Cir. 2002). On January 7, 2003,

an attorney for Truth, Robert Tyler, wrote to Albrecht stating that it was "constitutionally imperative that [Kentridge] grant [appellants'] proposed Bible Club treatment and rights equal to all other noncurriculum clubs." The letter also insisted that Kentridge "immediately adhere to the requirements of the Equal Access Act and the First Amendment," and threatened litigation if Kentridge did not comply.

On January 30, 2003, Tyler sent a second letter to Michael Harrington, counsel for the Kent School District. Tyler requested the forms required to establish an ASB club, and threatened litigation if Truth's charter was not approved by February 4.

On February 2, as requested by Anderson, Undis and Stewart submitted a new application (second charter). The second charter removed the quote-of-the-week and monthly theme decoration provisions of the first charter. The club's stated purpose was now to "provid[e] a biblically-based club for those students interested in growing in their relationship with Jesus Christ." Although membership would be open to all students, the second charter restricted voting membership to "members professing belief in the Bible and in Jesus Christ." Officers would also be required to "believe in and be committed to biblical principles."

After a third letter to Harrington from Tyler, the second charter was discussed at an ASB Council meeting on March 27. Some students expressed disapproval of the club's name, suggesting that it "implies that every other religion at Kentridge is a

lie." Some council members also expressed concerns that granting the charter would violate "[c]hurch and state" and that the voting membership should be open to everyone. Additionally, members suggested that students could go to "Young Life," a non-ASB recognized organization that met on Kentridge's campus after school hours. The minutes of the March 27 meeting reveal that the question of whether to approve the second charter was discussed for twenty minutes. No vote was taken.

The second charter was next addressed at an ASB Council meeting on April 1. After a brief clarification on the role of the advisor for the club, the minutes show that Anderson stated that if the ASB Council voted to approve the charter, he would consult the District's attorneys and Kentridge would make a final decision on approving the charter. The Counsel voted eleven to six against approval of Truth's second charter.

On April 3, Truth filed a complaint in the United States District Court for the Western District of Washington, alleging that defendants had violated the Act, as well as the First Amendment rights of free speech and expressive association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. Truth sought injunctive and declaratory relief as well as nominal damages.

On April 9, Anderson sent Stewart a letter informing her of her right to resubmit Truth's application for ASB club recognition: "As was discussed at the ASB meeting on March 28th, by making minor changes to Article[s] I and III of the

proposed Constitution for your club, you will address the points raised." Article I sets forth the name of the club and Article III contains the voting membership and officer restrictions. Anderson advised Stewart to "be prepared to resubmit by the April 25th ASB Meeting." Under the Kentridge ASB Constitution, "[a]ny rejected charters must be resubmitted within two weeks of rejection with the required changes made or the charter shall be permanently rejected."

Stewart and Undis submitted the third charter on April 24. The third charter maintains the proposed name "Truth." However, it divides the membership into three categories: voting members, non-voting members, and attendees. Meetings are open to everyone. But the "privilege of membership is contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible." The charter faith requires the person to affirm that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God." A voting member must also pledge that he or she believes "that salvation is an undeserved gift from God," and that only by "acceptance of Jesus Christ as my personal Savior, through His death on the cross for my sins, is my faith made real." Other than the ability to call oneself a "member," there is no difference between the rights of non-voting members and attendees.

The third charter was discussed at the April 25 ASB Council meeting. The ASB Council again objected to the name, selectivity provisions, and the

presence of religion in school. The council voted nineteen to zero to deny approval of the charter, with one member undecided. The minutes give four reasons why the charter was not accepted: 1) "Name," 2) "Pledge to vote," 3) "Segregating," 4) "Religious club in school."

On May 6, Tyler wrote to the Kent School District's counsel stating that it was his "understanding from the ASB Constitution that this rejection by the ASB is the final decision." The letter also provided that Tyler "was unable to locate any rights to appeal the decision of the ASB," but that if there were "a right to appeal the decision of the ASB," he asked that the letter "serve as a formal request for appeal."

Anderson advised Undis and Stewart in a May 12 letter "that pursuant to Kent School District Policy 2340, [they had] the ability to discuss this matter with Mr. Albrecht," and mentioned the possibility of discussions with the District superintendent or the ombudservices office. Although Tyler's May 6 letter would appear to have invoked these processes, no further action was taken by the District. Policy 2340 concerns "religious related activities or practices." The policy does not refer to ASB recognition, and the ASB Constitution does not refer to this policy as providing an avenue for an appeal of the District's decisions, which are otherwise "final."

Although Undis and Stewart have both graduated from Kentridge, they have indicated that another student, Lindsay Thomas, is prepared to assume leadership of the club if the charter is approved.

The Kent School District has three policies relevant to this appeal. First, Policy 3210 provides that "[t]he district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color, national origin, sex, marital status, previous arrest . . . , incarceration, or physical, sensory or mental disabilities." The district court held that inclusion of "creed" indicates that discrimination based upon religion is prohibited. That ruling has not been challenged on appeal.

Second, Policy 2153 provides for "noncurriculum-related, non ASB student groups," which groups the principal shall approve provided they meet several additional requirements, such as that they do not disrupt the school environment. While Policy 2153 groups may meet on school grounds before or after school, these groups do not receive other benefits accorded only to ASB-sponsored student clubs. Most significantly, only ASB-chartered groups may receive ASB funding and engage in purchasing through the Kent School District Finance Department. Each ASB club is provided with a faculty advisor or adult advisor designee, who must be present at all club meetings and assists in the planning and handling of the club's affairs. ASB clubs are also allowed to conduct meetings during noninstructional time, advertise their activities in school, use the public address system, and are recognized in the school yearbook. The District states that Truth "is free to operate as a private Policy 2153 group," but argues that Truth was properly denied ASB recognition.

Third, Policy 2340P regulates "religious related activities or practices," and provides guidelines for schools addressing religious holidays, symbols, ceremonies, topics, activities, and beliefs. This policy also provides that "[s]tudents, parents, and employees who are aggrieved by practices or activities conducted in the school or district may seek resolution of their concern first with the building principal, then with the district superintendent or designee, or use ombudservices, which is available through the Legal Services Department."

Washington State also has a relevant non-discrimination law, which the District relies on to justify its denial of ASB recognition for Truth. In 2003, Washington Revised Code § 49.60.215 (West 2006) provided that:

> It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, . . . or the refusing or withholding from any person the admission, patron-age, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, the presence of any sensory, mental, or physical disability, or the use of a

> trained dog guide or service animal by a disabled person.

The District has argued that these non-discrimination policies require it to deny ASB recognition to Truth.

As of April 3, 2003, there were thirty ASB-recognized clubs at Kentridge. While the record does not contain the charters of all the clubs, it appears that many of them have selective membership criteria. Indeed, each charter application contains a section for "Membership Criteria."

The EarthCorps, for example, requires members to show "interest and dedication toward environmental issues." Similarly, the Key Club requires that members be "interested in service, qualified scholastically, of good character, possessing leadership potential . . . [and] willing to perform at least fifty hours of . . . service." The Gay-Straight Alliance requires that students "must be willing to work towards the goals of the club" to be members. These goals include "bring[ing] GLBTQ [Gay, Lesbian, Bisexual, Transgendered, and Questioning] issues into the open, while working to decrease homophobia." Other goals include "changing stereotypes" and "fight[ing] heterosexism and other forms of oppression." The National Honor Society selects its members based on "outstanding scholarship, character, leadership, and service," and requires them to "behave in a courteous and respectful manner, refraining from language and actions that might bring discredit upon themselves." It also requires members to refrain from using or

possessing alcohol or illegal substances. Participation in school sports requires maintaining a certain grade point average and attendance record, not using drugs or alcohol, and complying with the "sports code." Finally, a Men's Honor Club and a Girl's Honor Club also operate at Kentridge as ASB-recognized groups. Each club has gender-exclusive membership.

The district court entered summary judgment on all of Truth's claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), with the exception of the Act claim. The court held that the requirements of municipal liability under 42 U.S.C. § 1983 were not satisfied, and therefore entered summary judgment in favor of the District. It also held that the actions against the individual defendants in their official capacities were functionally equivalent to suits directly against the municipality, and therefore Truth's claims against them failed.

The district court ruled on the merits of the Act and some of the First Amendment claims, addressing the latter as an alternate holding if its *Monell* ruling were to be reversed. It held that the restrictions on general membership in the third charter constituted a legitimate basis for denying the third charter and that these claims therefore failed.

The district court did not rule on the remaining claims based on its belief that "Plaintiffs' cursory Equal Protection Clause, Establishment Clause, and Free Exercise Clause arguments are all subsumed within their First Amendment argument." The

district court also did not address the District's argument that granting ASB recognition to Truth would violate the Establishment Clause.

On appeal, both sides agree that only the third charter is before us. Truth makes this concession even though this action was filed before the third charter and its complaint only addresses the denial of its second charter.

This appeal requires us to review many determinations by the district court. As to each issue, we review de novo. We review a district court's summary judgment de novo. *See Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). In deter-mining whether summary judgment was appropriate, we view the evidence in the light most favorable to Truth, the non-moving party. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). "We may affirm on any ground supported by the record." *Id.* We also review de novo the district court's *Monell* rulings, *see Doe v. Lebbos*, 348 F.3d 820, 825 (9th Cir. 2003), its "decision regarding the scope of a constitutional right," *see United States v. Napier*, 436 F.3d 1133, 1135-36 (9th Cir. 2006), and its interpretation of the Act, *see SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003).

II.

Before addressing the merits, we consider our jurisdiction. The District argues that Truth lacks standing under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), because Truth has failed to meet the "likelihood of recurrence" requirement. The District

asserts that Truth "cannot say the ASB or the District will always deny another Club application or even the same application."

[1] In order to establish Article III standing,

> a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000). Although the District has not made any arguments regarding these specific factors, we have an independent obligation to address whether we have subject-matter jurisdiction. *See Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999). "[A]t the summary judgment stage the plaintiffs need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

[2] With respect to injunctive relief, the Supreme Court has also required that a plaintiff show that "he is realistically threatened by a repetition of [the violation]." *Lyons*, 461 U.S. at 109. "The plaintiff need only establish that there is a reasonable expectation that his conduct will recur, triggering the alleged harm; he need not show that such

recurrence is probable." *Jones v. City of Los Angeles*, 444 F.3d 1118, 1127 (9th Cir. 2006), *citing Honig v. Doe*, 484 U.S. 305, 318 & n.6 (1988). While we have extended this requirement to declaratory relief, *see Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006), it does not apply to monetary damages, *see Lyons*, 461 U.S. at 105. The District's standing argument therefore does not implicate Truth's standing to seek nominal damages.

The District asserts that the Establishment Clause, state law, and its own non-discrimination policies mandate that it deny ASB recognition to Truth. If the District believes that three independent and binding legal authorities compel it to deny Truth's application, we do not see how the District might approve the same or a similar charter request in the future.

[3] The District's written non-discrimination policies also support Truth's standing arguments. We have held that plain-tiffs "may demonstrate that an injury is likely to recur by showing that the defendant had . . . a written policy, and that the injury 'stems from' that policy. Where the harm alleged is directly traceable to a written policy there is an implicit likelihood of its repetition in the immediate future." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004) (internal quotations and alterations omitted). Here, the harm is traceable to the District's policies, which the District has argued compel it to deny ASB recognition to Truth.

Additionally, despite Tyler's request that the District treat his letter as a "formal request for appeal," the District took no action. This is evidence that another charter request is likely to meet the same fate as the previous three. Finally, the District has provided nothing beyond its own speculation that the outcome might be different if Truth submitted a fourth charter. The legal positions it has taken in this litigation strongly suggest that no similar applications will ever be approved.

[4] Under these circumstances, we conclude that Truth has established at least a genuine issue of material fact as to whether there is a reasonable expectation that the alleged injury will recur. Therefore, Truth has standing to seek each of its requested forms of relief.

The District also suggests that this dispute is not ripe for review, and that we thus lack jurisdiction, because Truth did not bring the dispute to the Kent School District Board or Superintendent through Policy 2340P. The District is wrong. The Supreme Court has explicitly held that exhaustion is not required for claims brought under 42 U.S.C. § 1983. *See Steffel v. Thompson*, 415 U.S. 452, 472 73 (1974). Exhaustion cannot be dispositive under a ripeness analysis; otherwise ripeness doctrine would impose a *de facto* exhaustion requirement, in violation of *Steffel*. Thus, the alleged failure to exhaust administrative remedies may be at most only a factor in the ripeness analysis.

[5] Nevertheless, it appears that Truth did exhaust the formal appeal system. Tyler's May 6 letter to the

District's counsel asked that the letter "serve as a formal request for appeal." The District has not provided any reason why this notification was not sufficient to trigger its appeals process, and no reason is apparent in the record. The District's failure to take any action as a result of this request does not indicate that Truth failed to bring the matter to the attention of the District. Under these circumstances, there is at least a genuine issue of material fact as to whether Truth exhausted the District's grievance procedures.

Nearly every other factor suggests that this case is ripe for decision. Under the Kentridge ASB Constitution, "[a]ny rejected charters must be resubmitted within two weeks of rejection with the required changes made or the charter shall be permanently rejected." The ASB Constitution neither provides for any additional review, nor suggests that the ASB Council's decision lacked finality.

Furthermore, there is no doubt that the effects of the denial of Truth's charter have been felt in a concrete way by the appellants. Truth's members have experienced three denials of their applications, as well as protracted delays in obtaining any action from the ASB Council and District. The harm that Truth has complained of does not "rest[ ] upon contingent future events" or ones that "may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation omitted). Instead, Truth complains of discrete events that have already occurred.

[6] Finally, "in evaluating ripeness, courts assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 779-80 (9th Cir. 2000) (internal quotation omitted). We conclude the hardship to Truth in denying adjudication outweighs the hardship to the District in deciding this appeal. Truth's application for ASB recognition languished for nearly sixteen months without any significant action being taken, and the ASB process appears to have stalled until Truth obtained counsel and threatened to sue. More than five years have passed since the submission of the first charter, and declining to decide this appeal now would present a significant hardship to appellants.

[7] By contrast, the hardship to the District is significantly less severe. The District has been aware of Truth's arguments for a long time and has had ample opportunity to take corrective action or change its policies, if it so desired. Its legal positions on appeal show that it does not believe any remedial action is appropriate and that it believes the denial of ASB recognition was proper. We therefore conclude that this case is ripe for decision.

III.

[8] We must also consider the district court's ruling that the requirements of *Monell* are not met. *Monell* permits section 1983 actions against municipalities, but requires plaintiffs to show that their injuries resulted from "execution of a government's policy or custom, whether made by its lawmakers or by those

whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. *Monell*'s requirements do not apply where the plaintiffs only seek prospective relief, which is the case here. *See Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989). The District acknowledges the controlling effect of *Chaloux*, but argues that it should be overruled because it "rests on shaky grounds."

[9] It is well established in our circuit that while

> a three judge panel normally cannot overrule a decision of a prior panel on a controlling question of law, we may overrule prior circuit authority without taking the case en banc when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.

Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002) (internal citation and quotations omitted). The District argues that two Supreme Court cases, *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), and *McMillian v. Monroe County*, 520 U.S. 781 (1997), show that the "Supreme Court has re-emphasized the importance and vitality of the doctrine that requires a municipal policy as a precondition to a lawsuit under § 1983." Neither of these cases addresses whether *Monell* applies to actions only seeking prospective relief. We have no authority to overrule *Chaloux*. *Chaloux* applies, and the district court's *Monell* ruling is reversed.

IV.

Relying on its non-discrimination policies, the District points to three aspects of Truth's third charter that justify its decision to deny the club ASB recognition: 1) the general membership restrictions, 2) the leadership and voting membership restrictions, and 3) the name "Truth." The district court granted summary judgment based only on the first justification, and explicitly declined to reach the other two. Accordingly, we too limit our analysis to the general membership restrictions. So long as the District had at least one permissible basis for rejecting Truth's charter, the district court properly granted summary judgment, and we need not address the District's remaining justifications.

We begin our analysis by considering whether the District violated the Act. If we determine that it did not, we then move on to consider whether the District's actions ran afoul of the First Amendment. *See Prince v. Jacoby*, 303 F.3d 1074, 1077 (9th Cir. 2002) ("We consider each of Prince's access claims separately, first under the Act, and then the First Amendment, to the extent we find them outside the scope of the Act").

A.

[10] States have the constitutional authority to enact legislation prohibiting invidious discrimination. *See Roberts v. United States Jaycees*, 468 U.S. 609, 624-26 (1984) (reviewing the history of state anti-discrimination laws and observing that a "State enjoys broad authority to create rights of public

access on behalf of its citizens"). Truth asserts that it does not discriminate based on religion in violation of the plain language of the District's policies, but rather imposes a code of conduct not unlike those of other approved ASB clubs. Even assuming that non-Christians would be able to comply with Truth's view of "Christian character, Christian speech, Christian behavior and Christian conduct," we hold that the requirement that members possess a "true desire to . . . grow in a relationship with Jesus Christ" inherently excludes non-Christians.

[11] Having determined that the third charter violates the District's non-discrimination policies, we are led to hold that the District's denial of ASB recognition on this account would be consistent with the Act. The Act requires federally-funded schools that have created a limited open forum to grant religious clubs benefits and privileges afforded to all other non-curriculum clubs. *See Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 235-36 (1990); *Prince*, 303 F.3d at 1081 ("[T]he term 'equal access' means what the Supreme Court said in *Widmar* [*v. Vincent*, 454 U.S. 263, 267-71 (1981)]: religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities . . ."). *Prince* held that the rights protected under the Act include equal access to some of the benefits associated with ASB status, including ASB funding and public communication techniques. 303 F.3d at 1084-90. The District does not argue that it is not required under the Act to provide equal access to the ASB program.

In interpreting the Act, we begin with its plain language. "Where the intent of Congress has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Id.* at 1079 (internal quotations and citation omitted). Where there may be uncertainty, however, we rely on the Supreme Court's direction that the Act is to be "interpreted broadly," *Mergens*, 496 U.S. at 239, as well as cases deciding analogous issues under the First Amendment. *Cf. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 855- 56 (2d Cir. 1996) (adopting similar approach).

[12] By its plain terms, the Act prevents only denials of access or fair opportunity or discrimination "on the basis of the religious, political, philosophical, or other content of the speech at [a club's] meetings." 20 U.S.C. § 4071(a). Therefore, once it is established that the secondary school receives federal funds and has created a limited open forum, the club must demonstrate two additional elements to prevail: 1) a denial of equal access, or fair opportunity, or discrimination; 2) that is based on the "content of the speech" at its meetings.

[13] The District denied Truth ASB status, at least in part, based on its discriminatory membership criteria, not the religious "content of the speech."[4]

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[4] Although the District gave several reasons for denying Truth's charter, some of which appear to have been based on the content of Truth's speech, the district court based its analysis only on the group's discriminatory membership policies. Therefore, we too limit our analysis to this issue when determining whether the district court's summary judgment was appropriate.

The Act does not define "content of the speech," but that phrase has a particular meaning in First Amendment jurisprudence. We have held that "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) (quotations and citation omitted). Similarly, a "restriction on expressive activity is content-neutral if it is . . . based on a non-pretextual reason divorced from the content of the message attempted to be conveyed." *Id.* (quotations and citation omitted).

The Act, through which Congress extended the reasoning of the Supreme Court's 1981 decision in *Widmar v. Vincent* to secondary schools, *see Mergens*, 496 U.S. at 235, tracks *Widmar*'s emphasis on discrimination based on the content of the plaintiff's speech. *Widmar* struck down a state university's regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching." 454 U.S. 263, 265 (1981). *Widmar* thus precluded a university's "discriminatory exclusion from a public forum based on the religious content of a group's intended speech," *id.* at 269-70, but not its "right to exclude . . . First Amendment activities that violate reasonable campus rules." *Id.* at 277. Likewise, the Act prevents a school's unreasonable limitation on the conduct of a club to the extent the limitation is justified with reference to the expressive content of the regulated conduct. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is *justified*

without reference to the content of the regulated speech" (internal quotations and citation omitted)).

[14] Congress could have written the Act to protect religious clubs against a burden on their speech or activities, but did not. For example, when Congress passed the Religious Land Use and Institutionalized Persons Act, it not only prohibited discrimination against religious groups as such but also limited governments' abilities to impose even neutral, nondiscriminatory policies against them:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the bur-den on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). Thus, Congress knows how to draft a statute placing otherwise content-neutral laws of general applicability that incidentally burden a First Amendment activity under the same judicial scrutiny as laws specifically targeting the religious content of a group's expression. *See Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 985-86 (9th Cir. 2006). That is not the case

here. The Act clearly allows exclusions that are not "content"-based.

[15] The Act's legislative history strengthens our conclusion that it prohibits only content-based restrictions on religious groups. The legislative history focuses on Congress's intent to end school districts' previous practices of treating religious groups inequitably and forbidding them from meeting on campus. *See* S. Rep. 98-357, at 6, 1984 U.S.C.C.A.N. 2348, 2352 (1984) ("Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an [e]xtracurricular activity"); *id.* at 15, 1984 U.S.C.C.A.N. at 2361 ("[S]chool authorities across the country are banishing religious clubs from campus or placing such onerous restrictions on them that meetings become almost impossible"). The Senate Report recognized the possibility that religious groups like Truth might claim that content-neutral policies regulating club membership violate the Act, and disclaimed any such intent:

> At the same time, the guarantee of equal access does not require special treatment for religious groups. Religious groups are accorded only the same right and privileges as are granted to other student groups. In practice, however, this means that not all student groups would receive exactly the same privileges. There could be many neutral and impartial time, place, and manner restrictions placed on the use of school facilities which might produce situations in which some voluntary groups would not

> receive precisely the same access received by others. . . . The access determination could not be made, however, on the basis that the nature of the activity was religious.

Id. at 39, 1984 U.S.C.C.A.N. at 2385. The District's non-discrimination policies are not time, place or manner restrictions. But like such restrictions, the policies are content- neutral. This strongly suggests that Congress did not intend the Act to apply to non-discrimination policies.

[16] The parties do not dispute that the Kent School District receives federal funding, or that Kentridge has created a limited open forum for extracurricular student groups. The District contests, however, whether the Act's guarantee of equal access, fair opportunity, and non-discrimination protects Truth's freedom to exclude those who do not share Christian values from its general membership. On their face, the District's non-discrimination policies do not preclude or discriminate against religious speech. Truth also has not shown that the District justifies its non-discrimination policies with reference to the content of a message Truth's discriminatory conduct may attempt to convey. The policies are content-neutral. Therefore, to the extent they proscribe Truth's discriminatory general membership restrictions, the policies do not implicate any rights that Truth might enjoy under the Act. *Cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (holding that a statute or regulation that conditions government benefits on a non-

discriminatory campus access policy is properly categorized as conduct, not speech).

Our decision is not inconsistent with that of the Second Circuit, which has focused on the term "speech" in the Act rather than the content-neutrality (or lack thereof) of school policies. *See Hsu,* 85 F.3d at 856 (rejecting argument that Act was not implicated because "the School did not base its qualified recognition of the Club on what would be said at the Club meetings, but on what could be characterized as the Club's 'act' of excluding non-Christians from leadership"); *id.* at 859 (Act triggered "when an after-school religious club excludes people of other religions from conducting its meetings . . . to protect the expressive content of the meetings"). The court's decision in *Hsu* is readily distinguishable from the case at hand. In *Hsu*, a Christian group was seeking to impose a religious test for all of its *leadership* positions. *Id.* at 849. The court held that the group's ability to exclude non-Christians from some, but not all, of these leadership positions constituted "speech" within the meaning of the Act. *Id.* at 858. In contrast, we are only concerned with Truth's *general* membership requirements. The Second Circuit's decision in *Hsu* directly supports our holding with respect to these requirements. The court held that "a religious test for membership or attendance" would be "plainly insupportable," since "[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech." *Id.* at 858 & n.17.

[17] In short, Truth has not shown that the District's non-discrimination policy restricts ASB status on the basis of religion or the religious content of speech. Truth also argues, however, that the District violated the Act by allowing certain groups an *exemption* from the non-discrimination policy. Here we understand Truth to be challenging an allegedly arbitrary or discriminatory practice of granting waivers to non-religious groups, but not religious groups. This challenge is different in kind from one asserting that the application of the non-discrimination policy to Truth violates Truth's rights under the Act. If indeed the District has a policy of enforcing the non-discrimination policy only against religious groups, this policy would of course violate the Act. Many of the so-called 'exemptions' that Truth contests are in fact consistent with the District's non-discrimination policy. For example, several clubs, such as the EarthCorps and the Gay-Straight Alliance, require their members to support a specific political cause, but nothing in the District's non-discrimination policy prohibits discrimination on the basis of political belief. However, at least two groups, the Men's Honor Club and the Girl's Honor Club, were granted ASB recognition even though their membership is based on gender, a protected ground under the District's policy. There is no evidence in the record as to why these groups were allowed apparent waivers from the District's non-discrimination policy. Thus, to the extent Truth alleges that the District provided waivers to these groups while denying them to others, and that decision was made on the basis of religion or the

religious content of speech, Truth has raised a triable issue of fact.[5] Therefore, we reverse the district court's summary judgment and remand for further proceedings on this limited issue.

B.

[18] We next address whether, and if so how, the First Amendment may apply where a school denies ASB recognition to a student club based on its membership criteria. As an initial matter, it is important to emphasize that the members of Truth are not seeking merely to associate as a group; they are seeking to associate as a *school-sponsored* group. Specifically, ASB recognition would give Truth access to ASB funds, additional access to the school's

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[5] Although Truth has raised a triable issue of fact, we call attention to two potential problems with its argument. First, Congress has specifically allowed for "separate but equal" gender discrimination in the context of school and youth activities. *See* 20 U.S.C. § 1681(a)(6) (providing that gender discrimination is allowed with regard to certain social fraternities and sororities and volunteer youth organizations that have traditionally been limited to one sex). Therefore, that the District exempts the Men's and Girl's Honor Clubs from its overarching gender discrimination policy does not, by itself, suggest an arbitrary or discriminatory application of that policy so as to violate the Act. Second, another high school and a junior high school in the District have granted ASB-recognition to other Bible groups that do not discriminate in their membership criteria, making it even less likely that the District's application of its anti-discrimination policy in this case was merely a pretext for religious animus. Nevertheless, because the record is devoid of any evidence as to the actual reason that the District granted a non discrimination waiver to the Men's and Girl's Honor Clubs, we must remand for further proceedings.

property and facilities, and special rights to post materials around the school. Therefore, we must evaluate the District's denial of ASB recognition as a restriction on a "limited public forum." *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (applying limited public forum analysis to religious group's request for student activities funds); *see also Prince*, 303 F.3d at 1091 (holding that a school, through its ASB program, "created a limited public forum").

The limited public forum framework "has been the source of much confusion" and the precise contours of the term "have not always been clear." *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (internal quotations and citation omitted). The Supreme Court first addressed the concept, indirectly, in *Widmar*. The Court recognized that, although the state is not required to open certain fora to public discourse, once it elects to do so, it "assume[s] an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267-68. Two years later, in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 44-45 (1983), the Supreme Court clarified that there are three categories of government-run fora. "At one end of the spectrum are streets and parks which have immemorially been held in trust for the use of the public." *Id.* at 45 (internal quotations omitted). On the opposite end of the spectrum are those government properties that have not been traditionally considered open to the public. *Id.* at 46. Finally, falling somewhere in between are limited public fora, which "consist[ ] of public property which the state

has opened for use by the public as a place for expressive activity." *Id.* at 45.

[19] In *Rosenberger*, the Supreme Court held that the government may exclude speech in a "limited public forum," so long as its reasons for doing so are viewpoint neutral and "reasonable in light of the purpose served by the forum." 515 U.S. at 829 (quotations and citation omitted). Access to ASB recognition qualifies as a limited public forum. *See Prince*, 303 F.3d at 1091. Therefore, we must consider whether the District's policy of restricting access to the ASB forum based on compliance with its non-discrimination policy is viewpoint neutral and reasonable in light of the purposes of the forum.

[20] The ASB Constitution makes it clear that the purpose of the organization "is to develop attitudes of and practice in good citizenship within the school; to promote harmonious relations between students, clubs, and activities; and to act as a forum for student and faculty expression." The constitution further states that this purpose will be carried out by "[h]elping the student body develop a regard for law and order by obeying, honoring, and sustaining the laws of Washington State and King County, as well as the rules of Kentridge Senior High School. . . ." These broad statements of purpose show that the purpose of the ASB program is to advance the school's basic pedagogical goals. The Supreme Court has emphasized that part of a school's mission is to instill in students the "shared values of a civilized social order," which includes instilling the value of non-discrimination. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988). Therefore, the

District's decision to restrict access to the ASB program based on a group's willingness to adhere to the school's non-discrimination policy is reasonable in light of the purposes of the forum.

Because this policy was reasonable in light of the purposes served by the ASB, we must next consider whether the group's exclusion was viewpoint neutral. The Supreme Court has explained that "[v]iewpoint discrimination is . . . an egregious form of content discrimination," and occurs when "the specific motivating ideology or the opinion or perspective of the speaker is the *rationale* for the restriction." *Rosenberger*, 515 U.S. at 829 (emphasis added); *see also Perry Educ. Ass'n*, 460 U.S. at 46 (regulation on access to a forum is not viewpoint neutral if it is "an effort to suppress expression merely because public officials oppose the speaker's view"). In cases where restriction to the forum is based solely on the group's religious viewpoint, the restriction is invalid. This was the case in *Prince*, where the school refused to recognize the school group World Changers "based purely on the [group's] religious viewpoint." 303 F.3d at 1091.

[21] Here, in contrast, the school is not denying Truth access based solely on its religious viewpoint, but rather on its refusal to comply with the District's non-discrimination policy. The District was therefore not engaging in viewpoint discrimination; the "perspective of the speaker" was not the "rationale" for denying Truth access to the limited public forum. *See Rosenberger*, 515 U.S. at 829. Applying the non-discrimination policy to exclude Truth does not show that the school administrators acted "merely because

[they] oppose the speaker's view." *Perry*, 460 U.S. at 46. In short, the District no more engaged in viewpoint discrimination by excluding Truth for refusing to comply with its non-discrimination policy than it would have engaged in viewpoint discrimination by refusing to grant ASB status to a Student Pro-Drug Club that refused to obey the school's anti-drug policy. *Cf. Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007) (holding that schools may censor even *private* student speech that occurs on school grounds that "they reasonably regard as promoting illegal drug use").

[22] This conclusion, of course, rests on the premise that the ASB actually denied Truth's recognition based on its failure to comply with the District's non-discrimination policy. There is evidence in the record that other groups, such as the Men's and Girl's Honor Clubs, were granted ASB recognition despite violating the District's non-discrimination policy. Therefore, to the extent Truth argues that it was denied an *exemption* from the non-discrimination policy based on the content of its speech, we hold it has raised a triable issue of fact, and reverse the district court's summary judgment.

V.

[23] Truth also makes a claim under the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. The district court did not explicitly reach these claims, on the grounds that Truth's "cursory Equal Protection Clause, Establishment Clause, and Free Exercise arguments are all subsumed within their First Amendment

argument . . . ." On appeal, Truth continues to give cursory treatment to these claims. Nevertheless, Truth may have a valid argument. As discussed earlier, we are remanding to the district court to determine whether Truth was denied an exemption from the District's non-discrimination policy, and whether that denial was based on religion or the content of Truth's speech. To the extent Truth can make out a colorable First Amendment violation on these grounds, it may also have a Free Exercise claim, since "the Supreme Court noted that free exercise claims implicating other constitutional protections, such as free speech, could qualify for strict scrutiny review . . . ." *Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002). Moreover, if Truth can demonstrate that it was singled out for unequal treatment on the basis of religion, it may also have a potentially valid Equal Protection or Establishment Clause argument. Therefore, we remand these issues to the district court to be considered along with the exemption issue discussed previously.

Finally, the District has argued that the ASB has free speech rights that would be violated if it were compelled to recognize Truth as an ASB organization. The ASB is not a party to this appeal and there is no indication that the District has authorization from the ASB to assert any such First Amendment claims. We conclude that the District lacks prudential standing to assert the ASB's free speech rights. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("[A] party generally must assert his own legal rights and interests, and cannot rest his claim

to relief on the legal rights or interests of third parties." (quotations and citation omitted)).

VI.

It is prudent to address only those issues necessary for our decision on the third charter application. We hold only that the District did not violate the Act or Truth's First Amendment rights by applying its non-discrimination policy to require Truth to remove its general membership provision. To the extent Truth alleges that the District violated the Act or the First Amendment by refusing to provide an exemption to its non-discrimination policy—based on Truth's religion or the content of its speech—we reverse the district court's summary judgment, and remand for further proceedings.

REVERSED AND REMANDED.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRUTH, an unincorporated association; SARICE UNDIS, a minor, by and through her father, LARRY UNDIS; JULIANNE STEWART, a minor, by and through her parents, PAUL and ANNA STEWART,

Plaintiffs-Appellants,

v.

KENT SCHOOL DISTRICT; BARBARA GROHE, Superintendent of Kent School District; MIKE ALBRECHT, Principal of Kentridge High School; ERIC ANDERSON, Assistant Principal of Kentridge High School, in their official capacities,

Defendants-Appellees.

No. 04-35876

D.C. No. CV-03-00785-MJP

OPINION

Appeal from the United States District Court for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted
July 27, 2006—Seattle, Washington

Filed August 24, 2007

Before: J. Clifford Wallace, Kim McLane Wardlaw, and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Wallace

COUNSEL

Robert H. Tyler, Alliance Defense Fund, Murrieta, California, for the plaintiffs-appellants.

Michael B. Tierney, Mercer Island, Washington, for the defendants-appellees.

Jane M. Whicher, Port Townsend, Washington, for amicus American Civil Liberties Union.

Sara J. Rose, Washington, D.C., for amicus Americans United for Separation of Church and State.

David F. McDowell, Los Angeles, California, for amicus Anti-Defamation League.

OPINION

WALLACE, Senior Circuit Judge:

Appellants Truth, Sarice Undis, and Julianne Stewart (collectively, Truth) appeal from a summary judgment in favor of the Kent School District and other appellees (collectively, District). Truth alleges violations of the Equal Access Act (the Act), the First Amendment rights of free speech and expressive

association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

I.

This appeal arises from Truth's attempt to form a student club at Kentridge High School (Kentridge), which is part of the Kent School District. Under the relevant policies at Kentridge, "[u]nchartered clubs are not permitted to exist." To obtain a charter, students must submit a proposed charter to the Associated Student Body (ASB) Council and secure approval.

Beginning in the fall semester of 2001, appellants Undis, then a junior, and Stewart, then a sophomore, attempted to form a Bible club at Kentridge. Undis and Stewart submitted a "Club Charter Application" (first charter) for official recognition as an ASB organization in September 2001. This first charter indicated that the club's name was to be "Truth" and that the purpose of the organization was to "have a Bible study to encourage and help become better people with good morals." Under the section "Membership Criteria," the first charter indicated that the group was to be "[o]pen to anyone." The charter also proposed that it would designate a "quote of the week for announcement" and "once a month decorate [the] school with a theme."

The ASB Council discussed Truth's first charter at a September 2001 meeting, and several students

objected to chartering Truth. The ASB Council decided to consult with the Assistant Principal, appellee Eric Anderson. Anderson and appellee Mike Albrecht, Principal of Kentridge, later told Undis that they would speak with the school's attorney regarding the legality of granting Truth ASB recognition. Albrecht stated that "the problem with the September 2001 proposal was that it involved broadcasting a weekly Bible quote over the school's public address system and monthly decoration of the school in a biblical theme."

No action was taken on the first charter for the remainder of the 2001-02 school year. During that time, Undis asked Anderson to make a decision on Truth's application on at least ten occasions, to no avail. Sometime in the spring semester of 2002, all ASB clubs were instructed to resubmit their charters. The record does not reveal any further activity on Truth's application during the summer and fall semesters of 2002.

During this period, we decided *Prince v. Jacoby*, which involved a request by a Bible club for ASB recognition in a different Washington school district. 303 F.3d 1074 (9th Cir. 2002). On January 7, 2003, an attorney for Truth, Robert Tyler, wrote to Albrecht stating that it was "constitutionally imperative that [Kentridge] grant [appellants'] proposed Bible Club treatment and rights equal to all other noncurriculum clubs." The letter also insisted that Kentridge "immediately adhere to the requirements of the Equal Access Act and the First Amendment," and threatened litigation if Kentridge did not comply.

On January 30, 2003, Tyler sent a second letter to Michael Harrington, counsel for the Kent School District. Tyler requested the forms required to establish an ASB club, and threatened litigation if Truth's charter was not approved by February 4.

On February 2, as requested by Anderson, Undis and Stewart submitted a new application (second charter). The second charter removed the quote-of-the-week and monthly theme decoration provisions of the first charter. The club's stated purpose was now to "provid[e] a biblically-based club for those students interested in growing in their relationship with Jesus Christ." Although membership would be open to all students, the second charter restricted voting membership to "members professing belief in the Bible and in Jesus Christ." Officers would also be required to "believe in and be committed to biblical principles."

After a third letter to Harrington from Tyler, the second charter was discussed at an ASB Council meeting on March 27. Some students expressed disapproval of the club's name, suggesting that it "implies that every other religion at Kentridge is a lie." Some council members also expressed concerns that granting the charter would violate "[c]hurch and state" and that the voting membership should be open to everyone. Additionally, members suggested that students could go to "Young Life," a non-ASB recognized organi-zation that met on Kentridge's campus after school hours. The minutes of the March 27 meeting reveal that the question of

whether to approve the second charter was discussed for twenty minutes. No vote was taken.

The second charter was next addressed at an ASB Council meeting on April 1. After a brief clarification on the role of the advisor for the club, the minutes show that Anderson stated that if the ASB Council voted to approve the charter, he would consult the District's attorneys and Kentridge would make a final decision on approving the charter. The Counsel voted eleven to six against approval of Truth's second charter.

On April 3, Truth filed a complaint in the United States District Court for the Western District of Washington, alleging that defendants had violated the Act, as well as the First Amendment rights of free speech and expressive association, the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. Truth sought injunctive and declaratory relief as well as nominal damages.

On April 9, Anderson sent Stewart a letter informing her of her right to resubmit Truth's application for ASB club recognition: "As was discussed at the ASB meeting on March 28th, by making minor changes to Article[s] I and III of the proposed Constitution for your club, you will address the points raised." Article I sets forth the name of the club and Article III contains the voting membership and officer restrictions. Anderson advised Stewart to "be prepared to resubmit by the April 25th ASB Meeting." Under the Kentridge ASB Constitution, "[a]ny rejected charters must be resubmitted within two weeks of rejection with the

required changes made or the charter shall be permanently rejected."

Stewart and Undis submitted the third charter on April 24. The third charter maintains the proposed name "Truth." However, it divides the membership into three categories: voting members, non-voting members, and attendees. Meetings are open to everyone. But the "privilege of membership is contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible." The charter application also lists a "true desire to . . . grow in a relationship with Jesus Christ" under the "Membership Criteria" heading. In order to be a voting member or officer, students are required to sign a "statement of faith." The statement of faith requires the person to affirm that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God." A member must also pledge that he or she believes "that salvation is an undeserved gift from God," and that only by "acceptance of Jesus Christ as my personal Savior, through His death on the cross for my sins, is my faith made real." Other than the ability to call oneself a "member," there is no difference between the rights of non-voting members and attendees.

The third charter was discussed at the April 25 ASB Council meeting. The ASB Council again objected to the name, selectivity provisions, and the presence of religion in school. The council voted nineteen to zero to deny approval of the charter, with one member undecided. The minutes give four

reasons why the charter was not accepted: 1) "Name," 2) "Pledge to vote," 3) "Segregating," 4) "Religious club in school."

On May 6, Tyler wrote to the Kent School District's counsel stating that it was his "understanding from the ASB Constitution that this rejection by the ASB is the final decision." The letter also provided that Tyler "was unable to locate any rights to appeal the decision of the ASB," but that if there were "a right to appeal the decision of the ASB," he asked that the letter "serve as a formal request for appeal."

Anderson advised Undis and Stewart in a May 12 letter "that pursuant to Kent School District Policy 2340, [they had] the ability to discuss this matter with Mr. Albrecht," and mentioned the possibility of discussions with the District superintendent or the ombudservices office. Although Tyler's May 6 letter would appear to have invoked these processes, no further action was taken by the District. Policy 2340 concerns "religious related activities or practices." The policy does not refer to ASB recognition, and the ASB Constitution does not refer to this policy as providing an avenue for an appeal of the District's decisions, which are otherwise "final."

Although Undis and Stewart have both graduated from Kentridge, they have indicated that another student, Lindsay Thomas, is prepared to assume leadership of the club if the charter is approved.

The Kent School District has three policies relevant to this appeal. First, Policy 3210 provides that "[t]he district will provide equal educational

opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color, national origin, sex, marital status, previous arrest . . . , incarceration, or physical, sensory or mental disabilities." The district court held that inclusion of "creed" indicates that discrimination based upon religion is prohibited. That ruling has not been challenged on appeal.

Second, Policy 2153 provides for "noncurriculum-related, non ASB student groups," which groups the principal shall approve provided they meet several additional requirements. The policy does not accord ASB privileges to Policy 2153 groups. The District states that Truth "is free to operate as a private Policy 2153 group," but argues that Truth was properly denied ASB recognition.

Third, Policy 2340P regulates "religious related activities or practices," and provides guidelines for schools addressing religious holidays, symbols, ceremonies, topics, activities, and beliefs. This policy also provides that "[s]tudents, parents, and employees who are aggrieved by practices or activities conducted in the school or district may seek resolution of their concern first with the building principal, then with the district superintendent or designee, or use ombudservices, which is available through the Legal Services Department."

Washington State also has a relevant non-discrimination law, which the District relies on to

justify its denial of ASB recognition for Truth. Washington Revised Code § 49.60.215 (West 2006) provides that:

> It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination, . . . or the refusing or withholding from any person the admission, patron-age, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement, except for conditions and limitations established by law and applicable to all persons, regardless of race, creed, color, national origin, sexual orientation, sex, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a disabled person.

The District has argued that these non-discrimination policies require it to deny ASB recognition to Truth.

As of April 3, 2003, there were thirty ASB-recognized clubs at Kentridge. There is no evidence of any Policy 2153 groups at Kentridge. While the record does not contain the charters of all the clubs, it appears that many of them have selective membership criteria, restricting member-ship based on both beliefs and conduct. Indeed, each charter application contains a section for "Membership Criteria."

The Earth Corps, for example, requires members to show "interest and dedication toward environmental issues." Similarly, the Key Club requires that members be "interested in service, qualified scholastically, of good character, possessing leadership potential . . . [and] willing to perform at least fifty hours of . . . service." The Gay-Straight Alliance requires that students "must be willing to work towards the goals of the club" to be members. These goals include "bring[ing] GLBTQ [Gay, Lesbian, Bisexual, Transgendered, and Questioning] issues into the open, while working to decrease homophobia." Other goals include "changing stereotypes" and "fight[ing] heterosexism and other forms of oppression." The National Honor Society selects its members based on "outstanding scholarship, character, leadership, and service," and requires them to "behave in a courteous and respectful manner, refraining from language and actions that might bring discredit upon themselves." It also requires members to refrain from using or possessing alcohol or illegal substances. Participation in school sports requires maintaining a certain grade point average and attendance record, not using drugs or alcohol, and complying with the "sports code." Finally, a Men's Honor Club and a Girls Honor Club also operate at Kentridge as ASB-recognized groups. Each club has gender-exclusive membership.

The district court entered summary judgment on all of Truth's claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), with the exception of the Act claim. The court held that the requirements of municipal liability under 42 U.S.C. §

1983 were not satisfied, and therefore entered summary judgment in favor of the District. It also held that the actions against the individual defendants in their official capacities were functionally equivalent to suits directly against the municipality, and therefore Truth's claims against them failed.

The district court ruled on the merits of the Act and some of the First Amendment claims, addressing the latter as an alternate holding if its *Monell* ruling were to be reversed. It held that the restrictions on general membership in the third charter constituted a legitimate basis for denying the third charter and that these claims therefore failed.

The district court did not rule on the remaining claims based on its belief that "Plaintiffs' cursory Equal Protection Clause, Establishment Clause, and Free Exercise Clause arguments are all subsumed within their First Amendment argument." The district court also did not address the District's argument that granting ASB recognition to Truth would violate the Establishment Clause.

On appeal, both sides agree that only the third charter is before us. Truth makes this concession even though this action was filed before the third charter and its complaint only addresses the denial of its second charter.

This appeal requires us to review many determinations by the district court. As to each issue, we review de novo. We review a district court's summary judgment de novo. *See Buono v. Norton*,

371 F.3d 543, 545 (9th Cir. 2004). In deter-mining whether summary judgment was appropriate, we view the evidence in the light most favorable to Truth, the non-moving party. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). "We may affirm on any ground supported by the record." *Id.* We also review de novo the district court's *Monell* rulings, *see Doe v. Lebbos*, 348 F.3d 820, 825 (9th Cir. 2003), its "decision regarding the scope of a constitutional right," *see United States v. Napier*, 436 F.3d 1133, 1135-36 (9th Cir. 2006), and its interpretation of the Act, *see SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003).

II.

Before addressing the merits, we consider our jurisdiction. The District argues that Truth lacks standing under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), because Truth has failed to meet the "likelihood of recurrence" requirement. The District asserts that Truth "cannot say the ASB or the District will always deny another Club application or even the same application."

[1] In order to establish Article III standing,

> a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000). Although the District has not made any arguments regarding these specific factors, we have an independent obligation to address whether we have subject-matter jurisdiction. *See Dittman v. California*, 191 F.3d 1020, 1025 (9th Cir. 1999). "[A]t the summary judgment stage the plaintiffs need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

[2] With respect to injunctive relief, the Supreme Court has also required that a plaintiff show that "he is realistically threatened by a repetition of [the violation]." *Lyons*, 461 U.S. at 109. "The plaintiff need only establish that there is a reasonable expectation that his conduct will recur, triggering the alleged harm; he need not show that such recurrence is probable." *Jones v. City of Los Angeles*, 444 F.3d 1118, 1127 (9th Cir. 2006), *citing Honig v. Doe*, 484 U.S. 305, 318 & n.6 (1988). While we have extended this requirement to declaratory relief, *see Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006), it does not apply to monetary damages, *see Lyons*, 461 U.S. at 105. The District's standing argument therefore does not implicate Truth's standing to seek nominal damages.

The District asserts that the Establishment Clause, state law, and its own non-discrimination policies mandate that it deny ASB recognition to Truth. If the District believes that three independent

and binding legal authorities compel it to deny Truth's application, we do not see how the District might approve the same or a similar charter request in the future.

[3] The District's written non-discrimination policies also support Truth's standing arguments. We have held that plaintiffs "may demonstrate that an injury is likely to recur by showing that the defendant had . . . a written policy, and that the injury 'stems from' that policy. Where the harm alleged is directly traceable to a written policy there is an implicit likelihood of its repetition in the immediate future." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004) (internal quotations and alterations omitted). Here, the harm is traceable to the District's policies, which the District has argued compel it to deny ASB recognition to Truth.

Additionally, despite Tyler's request that the District treat his letter as a "formal request for appeal," the District took no action. This is evidence that another charter request is likely to meet the same fate as the previous three. Finally, the District has provided nothing beyond its own speculation that the outcome might be different if Truth submitted a fourth charter. The legal positions it has taken in this litigation strongly suggest that no similar applications will ever be approved.

[4] Under these circumstances, we conclude that Truth has established at least a genuine issue of material fact as to whether there is a reasonable expectation that the alleged injury will recur.

Therefore, Truth has standing to seek each of its requested forms of relief.

The District also suggests that this dispute is not ripe for review, and that we thus lack jurisdiction, because Truth did not bring the dispute to the Kent School District Board or Superintendent through Policy 2340P. The District is wrong. The Supreme Court has explicitly held that exhaustion is not required for claims brought under 42 U.S.C. § 1983. *See Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974). Exhaustion cannot be dispositive under a ripeness analysis; otherwise ripeness doctrine would impose a *de facto* exhaustion requirement, in violation of *Steffel*. Thus, the alleged failure to exhaust administrative remedies may be at most only a factor in the ripeness analysis.

[5] Nevertheless, it appears that Truth did exhaust the formal appeal system. Tyler's May 6 letter to the District's counsel asked that the letter "serve as a formal request for appeal." The District has not provided any reason why this notification was not sufficient to trigger its appeals process, and no reason is apparent in the record. The District's failure to take any action as a result of this request does not indicate that Truth failed to bring the matter to the attention of the District. Under these circumstances, there is at least a genuine issue of material fact as to whether Truth exhausted the District's grievance procedures.

Nearly every other factor suggests that this case is ripe for decision. Under the Kentridge ASB Constitution, "[a]ny rejected charters must be

resubmitted within two weeks of rejection with the required changes made or the charter shall be permanently rejected." The ASB Constitution does not provide for any additional review, nor does it suggest that the ASB Council's decision lacked finality.

Furthermore, there is no doubt that the effects of the denial of Truth's charter have been felt in a concrete way by the appellants. Truth's members have experienced three denials of their applications, as well as protracted delays in obtain-ing any action from the ASB Council and District. The harm that Truth has complained of does not "rest[ ] upon contingent future events" or ones that "may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Instead, Truth complains of discrete events that have already occurred.

[6] Finally, "in evaluating ripeness, courts assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 779-80 (9th Cir. 2000) (internal quotation omitted). We conclude the hardship to Truth in denying adjudication outweighs the hardship to the District in deciding this appeal. Truth's application for ASB recognition languished for nearly sixteen months without any significant action being taken, and the ASB process appears to have stalled until Truth obtained counsel and threatened to sue. More than five years have passed since the submission of the first charter, and declining to decide this appeal now would present a significant hardship to appellants.

[7] By contrast, the hardship to the District is significantly less severe. The District has been aware of Truth's arguments for a long time and has had ample opportunity to take corrective action or change its policies, if it so desired. Its legal positions on appeal show that it does not believe any remedial action is appropriate and that it believes the denial of ASB recognition was proper. We therefore conclude that this case is ripe for decision.

III.

[8] We must also consider the district court's ruling that the requirements of *Monell* are not met. *Monell* permits section 1983 actions against municipalities, but requires plaintiffs to show that their injuries resulted from "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. *Monell*'s requirements do not apply where the plaintiffs only seek prospective relief, which is the case here. *See Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989). The District acknowledges the controlling effect of *Chaloux*, but argues that it should be overruled because it "rests on shaky grounds."

[9] It is well established in our circuit that while

> a three judge panel normally cannot overrule a decision of a prior panel on a controlling question of law, we may overrule prior circuit authority without taking the case en banc when an intervening Supreme Court decision

> undermines an existing precedent of the Ninth Circuit, and both cases are closely on point.

Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002) (internal citation and quotations omitted). The District argues that two Supreme Court cases, *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), and *McMillian v. Monroe County*, 520 U.S. 781 (1997), show that the "Supreme Court has re-emphasized the importance and vitality of the doctrine that requires a municipal policy as a precondition to a lawsuit under § 1983." Neither of these cases addresses whether *Monell* applies to actions only seeking prospective relief. We have no authority to overrule *Chaloux*. *Chaloux* applies, and the district court's *Monell* ruling is reversed.

IV.

Relying on its non-discrimination policies, the District points to three aspects of Truth's third charter that justify its decision to deny the club ASB recognition: 1) the general membership restrictions, 2) the leadership and voting membership restrictions, and 3) the name "Truth." We address the first of these, holding that Truth's general membership restrictions violate the District's non-discrimination policies and are not protected by either the Act or the First Amendment.

A.

[10] States have the constitutional authority to enact legislation prohibiting invidious discrimina-

tion. *See Roberts v. United States Jaycees*, 468 U.S. 609, 624-26 (1984) (reviewing the history of state anti-discrimination laws and observing that a "State enjoys broad authority to create rights of public access on behalf of its citizens"). Truth asserts that it does not discriminate based on religion in violation of the plain language of the District's policies, but rather imposes a code of conduct not unlike those of other approved ASB clubs. Even assuming that non-Christians would be able to comply with Truth's view of "Christian character, Christian speech, Christian behavior and Christian conduct," we hold that the requirement that members possess a "true desire to...grow in a relationship with Jesus Christ" inherently excludes non-Christians.

[11] Having determined that the third charter violates the District's non-discrimination policies, we are led to hold that the District's denial of ASB recognition on this account is consistent with the Act. The Act requires federally-funded schools that have created a limited open forum to grant religious clubs benefits and privileges afforded to all other noncurriculum clubs. *See Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 235-36 (1990); *Prince*, 303 F.3d at 1081 ("[T]he term 'equal access' means what the Supreme Court said in *Widmar* [*v. Vincent*, 454 U.S. 263, 267-71 (1981)]: religiously-oriented student activities must be allowed under the same terms and conditions as other extracurricular activities . . . ."). *Prince* held that the rights protected under the Act include equal access to the funding and public communication techniques associated with recognition as an ASB group. 303 F.3d at 1084-90.

Truth now requests an exemption from school policies regulating Truth's conduct, arguing that its rights under the Act would be violated were it not granted such an exemption. In interpreting the Act, we begin with its plain language. "Where the intent of Congress has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Id.* at 1079 (internal quotations and citation omitted). Where there may be uncertainty, however, we rely on the Supreme Court's direction that the Act is to be "interpreted broadly," *Mergens*, 496 U.S. at 239, as well as cases deciding analogous issues under the First Amendment. *Cf. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 855-56 (2d Cir. 1996) (adopting similar approach).

[12] By its plain terms, the Act prevents only denials of access or fair opportunity or discrimination "on the basis of the religious, political, philosophical, or other content of the speech at [a club's] meetings." 20 U.S.C. § 4071(a). Therefore, once it is established that the secondary school receives federal funds and has created a limited open forum, the club must demonstrate two additional elements to prevail: 1) a denial of equal access, or fair opportunity, or discrimination; 2) that is based on the "content of the speech" at its meetings.

[13] The District has denied Truth ASB status not because of the religious "content of the speech," but rather because of its discriminatory membership criteria. The Act does not define "content of the speech," but that phrase has a particular meaning in First Amendment jurisprudence. We have held that

"whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) (quotations and citation omitted). Similarly, a "restriction on expressive activity is content-neutral if it is...based on a non-pretextual reason divorced from the content of the message attempted to be conveyed." *Id.* (quotations and citation omitted).

The Act, through which Congress extended the reasoning of the Supreme Court's 1981 decision in *Widmar v. Vincent* to secondary schools, *see Mergens*, 496 U.S. at 235, tracks *Widmar*'s emphasis on discrimination based on the content of the plaintiff's speech. *Widmar* struck down a state university's regulation prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching." 454 U.S. at 265. *Widmar* thus precluded a university's "discriminatory exclusion from a public forum based on the religious content of a group's intended speech," 454 U.S. at 269-70, but not its "right to exclude . . . First Amendment activities that violate reasonable campus rules," *id.* at 277. Likewise, the Act prevents a school's unreasonable limitation on the conduct of a club to the extent the limitation is justified with reference to the expressive content of the regulated conduct. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech" (internal quotations and citation omitted)).

[14] Congress could have written the Act to protect religious clubs against *any* burden on their activities, but did not. For example, when Congress passed the Religious Land Use and Institutionalized Persons Act, it not only prohibited discrimination against religious groups as such but also limited governments' abilities to impose even neutral, nondiscriminatory policies against them:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> > (A) is in furtherance of a compelling governmental interest; and
> >
> > (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). Thus, Congress knows how to draft a statute placing otherwise content-neutral laws of general applicability that incidentally burden a First Amendment activity under the same judicial scrutiny as laws specifically targeting the religious content of a group's expression. *See Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 985-86 (9th Cir. 2006). That is not the case here. The Act clearly allows exclusions that are not "content"-based.

[15] The Act's legislative history strengthens our conclusion that it prohibits only content-based restrictions on religious groups. The legislative history focuses on Congress's intent to end school districts' previous practice of treating religious groups inequitably and forbidding them from meeting on campus. *See* S. Rep. 98-357, at 6, 1984 U.S.C.C.A.N. 2348, 2352 (1984) ("Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity."); *id.* at 15, 1984 U.S.C.C.A.N. at 2361 ("[S]chool authorities across the country are banishing religious clubs from campus or placing such onerous restrictions on them that meetings become almost impossible."). The Senate Report recognized the possibility that religious groups like Truth might claim that content-neutral policies regulating club membership violate the Act, and disclaimed any such intent:

> At the same time, the guarantee of equal access does not require special treatment for religious groups. Religious groups are accorded only the same rights and privileges as are granted to other student groups. In practice, however, this means that not all student groups would receive exactly the same privileges. There could be many neutral and impartial time, place, and manner restrictions placed on the use of school facilities which might produce situations in which some voluntary groups would not receive precisely the same access received by others. . . . The access determination could not be made,

> however, on the basis that the nature of the activity was religious.

Id. at 39, 1984 U.S.C.C.A.N. at 2385. The District's non-discrimination policies are not time, place or manner restrictions. But like such restrictions, the policies are content-neutral. This strongly suggests that Congress did not intend the Act to apply to non-discrimination policies.

[16] The parties do not dispute that the Kent School District receives federal funding, or that Kentridge has created a limited open forum for extracurricular student groups. The District contests, however, whether the Act's guarantee of equal access, fair opportunity, and non-discrimination protects Truth's freedom to exclude those who do not share Christian values from its general membership. On their face, the District's non-discrimination policies do not preclude or discriminate against religious speech. Indeed, there are two other Bible clubs at Kentridge that have received ASB recognition and do not share Truth's general membership restrictions. Truth also has not shown that the District justifies its non-discrimination policies with reference to the content of a message Truth's discriminatory conduct may attempt to convey. The policies are content-neutral. Therefore, to the extent they proscribe Truth's discriminatory general membership restrictions, the policies do not implicate any rights that Truth might enjoy under the Act.

Our reasoning is in some tension with that of the Second Circuit, which has focused on the term

"speech" in the Act rather than the content-neutrality (or lack thereof) of school policies. *See Hsu,* 85 F.3d at 856 (rejecting argument that Act was not implicated because "the School did not base its qualified recognition of the Club on what would be said at the Club meetings, but on what could be characterized as the Club's 'act' of excluding non-Christians from leadership"); *id.* at 859 (Act triggered "when an after-school religious club excludes people of other religions from conducting its meetings . . . to protect the expressive content of the meetings"). However, the argument that the Act does not extend to content-neutral regulations, which we have concluded is correct, was not squarely addressed in *Hsu.*

Truth has also made a cursory argument that the District violated the Act by allowing other groups to impose codes of conduct and other selective membership criteria, while denying it an equal opportunity to do the same. With respect to most of these other groups, we can reject Truth's premise because the groups do not discriminate on a basis specifically enumerated by the non-discrimination policies.

It is true that the Men's and Girls Honor Clubs are more difficult to distinguish, as they employ gender-restrictive membership criteria. However, the record is devoid of any information on the approval processes for these clubs and the rationale given for the apparent exemption from the Kent School District's non-discrimination policies. Nor has Truth alleged that the District has a policy of granting exemptions, and that this policy was unequally

applied to Truth. Under these circumstances, we conclude that Truth has failed to meet its burden of showing that the District violated the Act.

[17] Because the Act did not bar the District from denying ASB recognition to Truth on account of the general membership restrictions in its third charter, we affirm the district court's summary judgment on Truth's claim under the Act.

B.

We next address whether, and if so how, the First Amendment may apply where a school denies ASB recognition to a student club based on its membership criteria. *Roberts* suggests that a First Amendment claim arising from such a denial may fall into one of two categories. *See* 468 U.S.at 622-23. Although these categories of claims may implicate different levels of review, we need not decide which test applies as Truth has failed to show that the denial of ASB recognition based on its general membership restrictions burdens a First Amendment interest, which is a threshold inquiry under either test.

Healy v. James typifies the first category of First Amendment claim. 408 U.S. 169 (1972). There, the president of a state college denied official recognition to a group of students who desired to form a local chapter of Students for a Democratic Society (SDS), an organization that, in the Supreme Court's view, had been a "catalytic force" behind "civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson." *Id.* at

170-71. The students sued the college president, among others, asserting that the denial of official recognition violated the First Amendment. *Id.* at 177. The Court held that the Second Circuit erred by discounting the existence of a cognizable First Amendment associational interest, *id.* at 181-82, 184, but also stated that if the district court on remand found that there was evidence to support the conclusion that a local SDS chapter posed "a substantial threat of material disruption," then the president's decision to deny official recognition should be affirmed, *id.* at 189.

"Associational activities," held the Court, "need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id.* The Court did not condemn incidental infringements on the students' associational rights, so long as the school's reason for denying official recognition was "directed at the organization's activities, rather than its philosophy." *Id.* at 188.

Healy observed that "the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." *Id.* at 192. This distinction permits schools to regulate student conduct, even if it incidentally affects student expression:

> Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected. A college administration may

> impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

Id. at 192-93. The Court "conclude[d] that the benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rule with which it disagrees." *Id.* at 193-94.

To determine whether a campus rule that incidentally burdens expressive rights is permissible under the First Amendment, *Healy* calls for applying the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). *Healy*, 408 U.S. at 189 n.20. In *O'Brien*, the government prosecuted an individual for burning his draft card, which the Court assumed to be expressive conduct. 391 U.S. at 376. The Court held that government regulation of expressive conduct is permissible

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the

> governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

[18] Accordingly, for the *O'Brien* test to apply, the government regulation must incidentally affect expressive conduct. Truth has not established that its policy of excluding persons who do not share Christian values from its general membership has any expressive content, let alone that this policy communicates a message consistent with the views of the club's organizers. Truth has thus failed to show the required incidental infringement of a First Amendment interest.

By contrast, a claim falling in the second *Roberts* category is one where a regulation imposes a Hobson's Choice on the organization: include unwanted members or disband. Such "forced-inclusion" claims have come in two varieties. First, an organization may challenge a state law that forces it to accept leaders or voting members who do not hold views consistent with the original members. *California Democratic Party v. Jones*, for instance, held that a state primary law violated the First Amendment because it forced "political parties to associate with — to have their nominees, and hence their positions, determined by — those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." 530 U.S. 567, 577 (2000). Similarly, *Democratic Party of*

the United States v. Wisconsin ex rel. La Follette overturned, on First Amendment grounds, a state law that effectively required the National Democratic Party, in violation of the party's rules, to allow non-party members to participate in the selection of the party's presidential nominee. 450 U.S. 107, 125-26 (1981) (*La Follette*).

Second, an organization may challenge a regulation that forces it to accept as members individuals whose very membership in the organization would force it to communicate a message inconsistent with the views of the organization's original members. Leading this line of cases is *Roberts*, where the Court upheld against a First Amendment challenge a state law requiring the Jaycees to admit women as voting members. 468 U.S. at 628-29. The Court did so in part because the "Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities." *Id.* at 627. In the Court's view, any claim that their admission "will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best." *Id.*

By contrast, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* held that a state law violated the First Amendment because it required parade organizers to allow a gay, lesbian, and bisexual contingent to march in the parade. 515 U.S. 557, 559 (1995). The Court emphasized that the contingent's mere presence behind the organizer's banner conflicted with the organizer's "particular point of view." *Id.* at 575.

The Court reached a similar conclusion in *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000). There, the Court held that a state non-discrimination law requiring the Boy Scouts to admit a gay-rights activist violated the First Amendment because it "force[d] the organization to send a message . . . that [it] accepts homosexual conduct as a legitimate form of behavior." *Id.* Significantly, this message conflicted with the "sincerely" held views of the organization. *Id.* Most recently, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* upheld the Solomon Amendment against a *Dale* challenge on the ground that the military recruiters required to be admitted to law schools "come onto campus for the limited purpose of trying to hire students — not to become members of the school's expressive association." 126 S.Ct. 1297, 1312 (2006).

In both of these forced-inclusion scenarios, the Court has applied strict scrutiny, asking whether the organization's freedom of expressive association "could be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (internal quotations and citation omitted); *see also Jones*, 530 U.S. at 582; *Roberts*, 468 U.S. at 623-26; *La Follette*, 450 U.S. at 125-26.

[19] The First Amendment interest implicated by the first kind of forced-inclusion case is not present here. The general members do not control the club's

Bible study and prayer functions. They do not lead the club in its activities. They cannot vote.

Truth has also not shown that the First Amendment interest implicated by the second kind of forced-inclusion case is present here. This case is not like *Hurley* or *Dale*. In *Hurley*, the gay, lesbian, and bisexual contingent wanted to be an equal participant in the organization's parade. In *Dale*, the gay-rights activist wanted to be a leader of the organization. Here, by contrast, those who merely seek general membership status do not seek to participate on equal footing with Truth's voting members or leaders. The concern that people outside the club will construe the non-Christian conduct of general members as conduct endorsed by Truth has therefore not been proven here to the same extent that it was demonstrated in *Hurley* and *Dale*. On this record, outside observers would not receive, from the admission of individuals that Truth wishes to exclude from its general membership, any message that conflicts with the club's views. Moreover, Truth states in its brief that the admission of non-Christians as general members would be unproblematic. While this statement does not resolve the issue before us — namely, whether the admission of individuals who do not meet Truth's general membership criteria (a category distinct from non-Christians) would convey a message in conflict with the club's views — it does further suggest that general membership status is not a significant measure of the club's expressive purposes.

In *Christian Legal Society v. Walker*, 453 F.3d 853, 857, 861-84 (7th Cir. 2006), the Seventh Circuit applied the forced-inclusion cases to a similar set of facts. Truth, however, has not shown the infringement of a cognizable First Amendment interest with respect to the District's denial of ASB recognition on account of the general membership restrictions. Therefore, we will not express any opinion here on whether the Seventh Circuit employed the appropriate legal framework.

[20] We thus affirm the district court's summary judgment on the First Amendment claim. We need not address whether the District violated the Act or the First Amendment by denying ASB recognition due to the voting membership and leadership restrictions. Nor do we address whether the Establishment Clause requires the District to deny Truth ASB recognition.

V.

We next discuss Truth's First Amendment Free Exercise Clause claim. Truth contends that the strict scrutiny standard of *Sherbert v. Verner*, 374 U.S. 398 (1963), applies, while the District appears to argue for application of the rational basis test of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

Ordinarily, "the rational basis test applies in ascertaining whether a neutral law of general applicability violates the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice." *San Jose*

Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1031 (9th Cir. 2004) (alterations and internal quotations omitted). "In *Smith*, [however,] the Supreme Court stated that free exercise claims implicating other constitutional protections, such as free speech, could qualify for [*Sherbert*] strict scrutiny review even if the challenged law is neutral and generally applicable." *Am. Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002). In order to make out such a hybrid claim, "a 'free exercise plaintiff must make out a colorable claim that a companion right has been violated.'" *Id.*, *quoting Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999).

[21] We have held that Truth's First Amendment argument with respect to the general membership restrictions is not colorable. Accordingly, rational basis review applies to the group's Free Exercise claim. Although the district court did not distinctly address this claim, we need not remand because it is clear that the claim is meritless. *See In re Pintlar Corp.*, 133 F.3d 1141, 1145 (9th Cir. 1998) ("Remand is not necessary where the issue has been fully briefed on appeal, the record is clear and remand would impose needless additional expense and delay" (internal quotation marks omitted)). The District had a rational basis for drafting and implementing its non-discrimination policies, namely its legitimate aim of preventing students from being subjected to unequal treatment on account of their religion. *See Roberts*, 468 U.S. at 623 (referring to the state's "compelling interest in eradicating discrimination").

[22] Truth's Equal Protection and Establishment Clause claims are given only brief treatment by Truth and rely on the same premise: that the unequal treatment of Truth's charter application violates the applicable clause of the Constitution. We need not reach the merits of this argument because we can reject the premise. Truth was not accorded unequal treatment, because the denial of its third charter was justified under the First Amendment and the Act based upon its general membership restrictions. This denial represented a neutral application of the Kent School District's non-discrimination policies and therefore did not constitute unequal treatment.

The District has also argued that the ASB has free speech rights that would be violated if it were compelled to recognize Truth as an ASB organization. The ASB is not a party to this appeal and there is no indication that the District has authorization from the ASB to assert any such First Amendment claims. We conclude that the District lacks prudential standing to assert the ASB's free speech rights. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("[A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (internal quotations omitted)).

VI.

[23] It is prudent to address only those issues necessary for our decision on the third charter application. We hold only that the District did not

violate the Act or Truth's First Amendment rights by requiring Truth to remove its general membership provision. Because the denial of Truth's third charter was permissible on this basis, we need go no further to affirm the summary judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRUTH, et al., Plaintiffs, v. KENT SCHOOL DISTRICT, et al., Defendants.	No. C03-785P ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties' cross-motions for summary judgment. (Dkt. Nos. 71, 74). Having reviewed the parties' pleadings and supporting materials and having heard oral argument by both parties, the Court GRANTS Defendants' Motion for Summary Judgment and DENIES Plaintiffs' Motion for Summary Judgment. Defendants are not liable under § 1983 for any alleged constitutional violations. Even if they were, Defendants' actions have not violated Plaintiffs' constitutional rights. Likewise, Defendants' actions have not violated the Equal Access Act.

BACKGROUND

This Court outlined in detail the facts in this case in its December 31, 2003 Order Denying Plaintiffs' Motion for a Preliminary Injunction, (Dkt. No. 58). In the statement of facts section of their current Motion for Summary Judgment, Plaintiffs quote the Preliminary Injunction Order's recitation of the facts. Because those facts remain unchanged, this Order's factual recitation is largely the same as in the Preliminary Injunction Order. Both parties point to additional relevant and undisputed facts, which are incorporated below.

This case involves a Christian student group's efforts to form a Bible club named "Truth" at Kentridge High School ("the School") and gain recognition as a legitimate non-curriculum student group, approved and funded by the High School's Associated Student Body ("ASB"). The ASB consists of selected students who act as representatives of the student body. (Stewart Decl.,[6] Ex. B). ASB clubs can meet during non-instructional time on campus and can raise money and receive ASB funds. Additionally, an ASB club is entitled to advertise its activities, be recognized in the school yearbook, and announce club activities over the public address system.

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[6] In their Motion for Summary Judgment, Plaintiffs incorporate and cite to the declarations of Sarice Undis, Julianne Stewart, Robert Tyler that were filed in support of Plaintiffs' Response to Defendants' (First) Motion for Summary Judgment, which was filed July 17, 2003. Therefore, this Order cites to these same declarations.

At the time this case was filed, Plaintiff Sarice Undis was a senior at Kentridge and Plaintiff Julianne Stewart was a junior there.[7] Both were involved in forming the Truth Bible Club ("the Bible Club" or "the Club"). In September, 2001, Ms. Stewart submitted an application, known as a "Charter," to the ASB for approval as an ASB club. (Tierney Decl.,[8] Ex. 8 ("the First Application")). The Charter application indicated that the Club's purpose was "to have Bible study to encourage and help become better people, with good morals." (Id.) The Club proposed to do a "quote of the week for announcement" and "once a month decorate [the] school with a theme" in addition to prayer. (Id.) The Club indicated that it would be open to everyone. (Id.) At an ASB meeting held in 2001 sometime after the application was submitted, numerous students objected to the Club. The ASB indicated that it intended to discuss the matter with Assistant Principal Eric Anderson. Assistant Principal Anderson then told Ms. Undis that he and Principal Michael Albrecht were going to speak with the school's attorney regarding the legality of the Bible Club. (Undis Decl., ¶ 5).

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[7] Both of these Plaintiffs have since graduated. Ms. Stewart indicates that Lindsay Thomas, a current student, has replaced Ms. Stewart as the unofficial leader of the Club. (Second Stewart Decl., ¶ 3).

[8] In the interest of clarity, "Tierney Decl." refers to the declaration of Michael Tierney, filed with Defendants' currently pending Motion for Summary Judgment, as opposed to the Tierney declaration, which was filed with Defendants' response to Plaintiffs' Motion for Summary Judgment.

According to Ms. Undis, between October, 2001 and June, 2002, she requested on at least ten occasions that Assistant Principal Anderson make a decision on the Club's application. (Id.) In the Spring of 2002, all school clubs were ordered to resubmit their Charters. (Id., ¶ 6). Ms. Undis states that "[i]t was common knowledge among the student club officials, due to a school newspaper article and various conversations, that the School District was discontent [sic] with the application by the Bible Club and the School District sought to have the present club charters appear more like 'curriculum related' clubs." (Id.) The record does not indicate that any change in the nature of the approved ASB clubs came of this effort. Ms Undis continued to request a decision on the Bible Club from September until December, 2002. (Id., ¶ 7).

On January 7, 2003, Robert Tyler, an attorney for the Plaintiffs, faxed a letter to Principal Albrecht, stating that the School was legally compelled to grant official recognition to the Club and demanding the School do so immediately. (Tyler Decl., Ex. J). On January 30, Mr. Tyler faxed a second letter to the School, this time directed to Michael Harrington, in-house counsel for the Kent School District ("the District"), asking for the forms necessary to file an application to gain ASB club status. The letter stated that the Plaintiffs would file a complaint in federal court if the Club were not approved by February 4. (Id., Ex. K).

Ms. Stewart submitted a new Charter application on February 2, 2003. (Tierney Decl., Ex.

9 ("the Second Application")). This application differed from the First Application in two relevant respects. First, the Second Application did not contain the same quote of the week or monthly decoration proposals. It indicated that its intended function was to "provide a biblically-based club for those students interested in growing in their relationship with Jesus Christ." Second, it stated that "only those professing a belief in the Bible and in Jesus Christ may vote." (Id.) The Club's constitution, which was submitted with the Charter application, reiterated the "belief" requirement for voting members. (Id., Ex. 10, Art. III).

On February 25, Mr. Tyler faxed a third letter to Mr. Harrington stating that neither he nor Plaintiffs had received word whether the Club was approved or not, and that if they did not hear by February 26, they would assume the application was denied. (Tyler Decl., Ex. L).

On March 27, 2003, Assistant Principal Anderson held an ASB meeting in which the Club's Second Application was discussed. (Tierney Decl., Ex. 20 (ASB meeting minutes)). Defendants maintain that the students on the ASB, not the School administration, raised concerns about the Club's name and membership requirements. Another meeting was held on April 1 in which the ASB denied the Club ASB status. (Id., Ex. 21 (ASB meeting minutes)). Following that meeting, Ms. Stewart claims that Assistant Principal Anderson informed her that the Club could amend the Charter application to address the ASB's concerns and resubmit its application. (Stewart Decl., ¶ 10).

However, there are no written documents in the record supporting this assertion.

On April 3, Plaintiffs filed a law suit against the District, Principal Albrecht, Assistant Principal Anderson, and Barbara Grohe, Superintendent of the District. Plaintiffs alleged violations of the Equal Access Act, the Free Speech Clause of the First Amendment, the Free Exercise Clause of the First Amendment, the Establishment Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. They alleged jurisdiction under 42 U.S.C. § 1983.

On April 9, 2003, Assistant Principal Anderson wrote a letter to Ms. Stewart indicating that she could resubmit her ASB application. The letter stated that "[a]s we discussed at the ASB meeting on March 28, by making minor changes to Article I [identifying the Club's name] and III [setting out the membership criteria] of the proposed constitution for your club, you will address the points raised." (Tierney Decl., Ex. 23).

On April 24, 2003, Ms. Stewart resubmitted an amended Charter application and amended constitution (Id., Exs. 11-12 ("the Third Application")). This version of the application differed from the Second Application in several relevant respects. First, in addition to its previously listed intended function, its purpose would be to "associate with other believers in Christian fellowship." Second, its general members were to have "a true desire to study the Bible and grow in a relationship with Jesus Christ." (Id., Ex. 11). The

accompanying amended constitution stated that "the privilege of membership is contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible." (Id., Ex. 12 ("the general membership policy")). Additionally, the application stated that "[o]n1y those willing to sign the statement of faith may be voting members." (Id., Ex. 11). The statement of faith requires the signor to state that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God," and that "salvation is an undeserved gift from God." (Id., Ex. 12). The constitution stated that "only persons who honestly sign the Statement of Faith ... are entitled to vote." (Id., Art. III ("the voting membership policy")). Lastly, it required that any student holding office "must honestly sign the statement of faith and believe in and be committed to biblical principles." (Id.)

In an ASB meeting on April 25, the ASB denied the Third Application. (Id., Ex. 22 (ASB meeting minutes))). The ASB members were opposed to the Club's faith-based membership requirement and the oath requirement for voting member status, and the Club's name "Truth" because they felt that it implied that differing religious beliefs were lies. (Anderson Decl. accompanying Defs' Resp. to Plfs' Mot. for Prelim. Inj., Exs. 1-3).

On May 12, 2003, Assistant Principal Anderson sent a letter to Ms. Undis and Ms. Stewart stating that he was aware that their request for ASB status was "declined" by the ASB Council. (Tierney

Decl., Ex. 24). He informed Plaintiffs that, pursuant to District Policy 2340, they had "the ability to discuss this matter" with the Principal. If they were not satisfied with this discussion, they were "welcome to make an appointment with the District Superintendent." Alternatively, they could contact that District Ombudservices' office. Assistant Principal Anderson stated that the "administration here at Kentridge and in the District retains the final oversight role in decisions about ASB clubs."

In this round of briefing, Plaintiffs now assert that the Club as described in the Third Application actually has three categories of students who may attend. The Court's Order denying Plaintiffs' Motion for Preliminary Injunction analyzed the Club as described in the Third Application as allowing two categories of students to participate: 1) general members, who must comply with the Christian conduct and speech standard; and 2) voting members, who had to sign the statement of faith. Plaintiffs now attempt to recharacterize the Club as allowing three categories of students to attend: 1) attendees, which includes students of all religions whether or not they comply with the Christian conduct and speech standard; 2) general members, who must comply the Christian conduct and speech standard; and 3) voting members, who must sign the statement of faith. (Second Stewart Decl., ¶¶ 5-7).

To support their general membership policy, Plaintiffs point to "codes of conduct" for membership that other ASB clubs at the School require. The National Honor Society conditions membership on "scholarship, character, leadership, and service" and

generally requires that members behave in a "courteous and respectful manner" and refrain from using illegal substances and alcohol. (Second Tyler Decl., Ex. G). The Girls Honor Society limits membership to girls with a certain GPA. (Id., Ex. H). The Boys Honor Society is intended to include "upright and virtuous students." (Id., Ex. J). The Gay-Straight Alliance is open to students who are "willing to work towards the goals of the club," which are listed as bringing "gay, lesbian, bisexual, transgendered, and questioning issue into the open, while working to decrease homophobia." (Id., Ex. K). The Key Club limits membership to those "interested in service, qualified scholastically, of good character, [and] possessing leadership potential." (Id., Ex. M). Lastly, the ASB conditions membership on following "the sports code." (Id., Ex. I). Participation in school sports requires that students comply with a code of conduct that includes maintaining a certain GPA, attendance record, and not using drugs or alcohol. (Id., Ex. A (Floyd Dep.) at 21). Additionally, the "sports code," as set out in the Athletic Handbook, requires that students "conduct themselves in a manner that will inspire pride and approval." (Id., Ex. E).

Plaintiffs rely heavily on a passage from the deposition of the District Superintendent, Barbara Grohe, for the proposition that the general code of conduct required of students relies on religious principles, which is no different from the Club's religious code of conduct requirement for general members. In her deposition, she was asked about her understanding of the meaning of "immoral conduct." (Id., Ex. D (Grohe Dep.) at 68). Superintendent

Grohe responded that "there are some generally accepted parameters around sexual conduct or vulgar speech." She was then asked if "there are general principles upon which your understanding of immoral conduct would come from, such as the Golden Rule, the Ten Commandments, the Torah, the Bible, a philosopher?" She answered "yes, all of those." (Id.) There is not enough of the deposition transcript included to know why she was being asked this since Plaintiffs have not pointed to any club that explicitly refers to a prohibition on "immoral conduct."

At oral argument on the preliminary injunction motion, Plaintiffs indicated that they seek to have the School grant the Club ASB status based on its Third Application and accompanying constitution. Nothing they have stated since indicates any change to their prior position. Indeed, much of their summary judgment briefing addresses the general membership policy, which is unique to the Third Application. Therefore, this Order is based on the Third Application.

ANALYSIS

Rule 56(c) provides, in part, that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (2003). Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City

of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). While "some alleged factual dispute between the parties will not defeat" a motion for summary judgment, "disputes over facts that might affect the outcome of the suit ... will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

I. Municipal Liability Under § 1983

As a threshold matter, Defendants argue that they are not liable under 42 U.S.C. § 1983 because no District policy caused the alleged deprivation of Plaintiffs' constitutional rights. Defendants raised this argument in an earlier Motion for Summary Judgment. The Court denied the motion on the grounds that there were genuine issues of fact as to 1) whether District officials of policymaking authority had actual knowledge of and were deliberately indifferent to the alleged constitutional violations occurring while Plaintiffs were seeking ASB status for the Club, and 2) whether District officials attempted to insulate themselves from liability for their unconstitutional policies by having the ASB Council deny the Club ASB status. (Dkt. No. 46). On both issues, the Court noted that Plaintiffs should be allowed to conduct discovery to support their deliberate indifference and/or evading liability theories of liability under § 1983. Defendants now argue that Plaintiffs have not revealed any facts that support either legal theory.

In general, municipalities and other bodies of local government are "persons" within the meaning

of 42 U.S.C. § 1983 that may be sued directly if they are alleged to have caused a constitutional tort through "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 (1978). While rejecting the use of the doctrine of respondeat superior, the Monell Court nevertheless concluded that local government could be held liable when an injury was inflicted by a government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy. . . ." Id. at 694.

There are three alternative means by which Defendants could be held liable under § 1983. First, a single decision by a policymaker can be considered "official policy" giving rise to municipal liability. Pembaur v. Cincinnati, 475 U. S. 469, 483-85 (1986) (plurality opinion). Thus, acts or decisions that were officially sanctioned or ordered by officials with final policymaking authority may trigger municipal liability. Id. State law determines whether a particular official has final policymaking authority. Id. In this case, the official with policymaking authority is the District Board of Directors ("the Board"). Under Washington law, an associated student body is formed with the approval of, regulated by, and operated subject to the control of the school district board of directors. RCW 28A.325.020, WAC § 392-138-010(1). See also RCW 28A.320.015(1) (a school district board of directors has the discretionary power to set policies regarding school programs, activities, and services). District Policies 1000 and 1001 identify the Board of Directors as the policymaker for the District.

(Tierney Decl., Exs. 1-2). The District's Board never decided one way or the other whether the Club should be granted ASB status. Therefore, there is no § 1983 municipal liability under this first standard.

As an alternative argument in support of this theory of liability, Plaintiffs argue the District is liable under § 1983 because officials within the District were aware of the Ninth Circuit's opinion in Prince v. Jacoby, 303 F.3d 1074, 1081 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 62 (2003), and yet treated the Club in the same manner that was found unlawful in Prince. In that case, the school had denied a religious club ASB status and had instead granted it separate status as a club under a school district policy (Policy 5525) that did not provide the same benefits as ASB clubs received. The Ninth Circuit held that the Equal Access Act required that schools provide religious clubs with equal access, which meant allowing them to exist under the same terms and conditions as other clubs. Id. at 1081-83. According to Plaintiffs, Defendants have done the exact same thing as in Prince when they indicated that the School would allow the Club in its current proposed form to be a Policy 2153 club, which is similar to a Policy 5525 club that was at issue in Prince. Plaintiffs contend that the District had a duty to ensure that the Club here was given the same access to ASB status as other clubs and that by failing to do so, they are liable under § 1983.

Plaintiffs' argument is unpersuasive. The District may very well have been aware of Prince and its requirement that schools grant access to religious clubs on the same terms and conditions as

other clubs. (See McCaleb Aff., Ex. A at 17-18). The District complies with this requirement, as evidenced by the fact that there are two religious clubs within the District that have ASB status. (Tierney Decl., Ex. 18 ("Bible Club" at Meridian Junior High School) and Ex. 19 ("Truth Seekers" at Kentwood High School)). The Club in this case is different from those clubs and the club at issue in Prince because none of those clubs had the exclusive membership policies that are present in this case. Prince's holding did not address the legal issues presented by these membership policies. Therefore, the District's knowledge of Prince does not compel the District to grant the Club ASB status and does not mean that allowing them to exist as a Policy 2153 club is unlawful under Prince. A second means by which Defendants could be held liable under § 1983 is if Plaintiffs demonstrate that a decision by an official with policymaking authority reflected deliberate indifference to the risk that a violation of Plaintiffs' constitutional rights would follow the decision. Bd. Of County Commissioners of Bryan Co. v. Brown, 520 U.S. 397, 411 (1997). To prove deliberate indifference, a plaintiff has to show that an official with policymaking authority had actual knowledge of the alleged constitutional violations. Cf. Gebser v. Lago Vista Independent Sch. Dist., 524 U.S. 274, 290-291 (1998) (requiring official's actual knowledge of sexual harassment for school's liability in Title IX claim in parallel to deliberate indifference standard for § 1983 claims). As stated above, the Board is the official with policymaking authority in this instance. Therefore, to establish municipal liability under this theory, Plaintiffs must show that the Board had actual knowledge of the alleged

constitutional violations that resulted from not granting the Club ASB status.

Plaintiffs have not introduced any evidence indicating that the Board knew of the Club and its attempt to attain ASB status between September, 2001 when the First Application was submitted, though December, 2002. While the Assistant Principal, Principal, and possibly the School's in-house counsel knew of the application and appeared to sit on it for over one year, there is no evidence that the Board knew of the Club and its pending application during this time.

In January, 2003, Plaintiffs' lawyer sent two letters, one to the Principal and the second to the School's in-house counsel, regarding Plaintiffs' grievances and the legal authority that he contended compelled the School to grant the Club ASB status. Again, however, there is no direct evidence that either the Principal or the School's in-house counsel informed the Board about these letters or forwarded a copy of either to them.

Plaintiffs argue that the Board knew of the Club's pending application and the potential constitutional issues involved before this lawsuit was filed on April 3, 2003. However, the evidence to support this proposition is inconclusive. Plaintiffs cite only two statements by two Board members from the various depositions of Board members that Plaintiffs took. One Board member states that the Board discussed the Club sometime during 2003; but he cannot remember when. (McCaleb Aff., Ex. C). Thus, it is inconclusive if this discussion took place

before or after Plaintiffs filed this lawsuit in April, 2003. The other deponent, the Board president, states that the Board discussed the Club sometime "within the past year." (Id., Ex. D). He was deposed in February, 2004. Thus, his recollection is that the Board discussed the Club sometime between February, 2003 and February, 2004. Again, this statement is inconclusive as to whether this discussion occurred before or after Plaintiffs filed this lawsuit. Given this inconclusive evidence, Plaintiffs have not provided sufficient evidence to support their deliberate indifference theory of liability.

A third alternative theory of municipal liability provides that a local government may be liable in § 1983 actions when the local government egregiously attempts to insulate itself from liability for its unconstitutional policies. City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (plurality opinion). Thus, in certain circumstances, liability may attach when a policymaker delegates his authority to another official. The Supreme Court in Praprotnik pointed to two instances in which delegation of authority would trigger § 1983 municipal liability: first, if a particular decision by a subordinate "was cast in the form of a policy statement and expressly approved by the supervising policymaker," and second, if "a series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware." Id. at 130. In such instances, "the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official."

Id. However, the mere exercise of discretion by a lower level official or "[s]imply going along" with the lower-ranking official's decisions is not sufficient to trigger § 1983 liability. Id. at 126-27, 130.

Plaintiffs argue that the Defendants attempted to evade liability by channeling the decision to grant the Club ASB status to the ASB Council, even though the Defendants knew that this decision had constitutional implications and that the ASB Council could not properly address such issues. According to Plaintiffs, the Defendants used the ASB Council as the District's proxy to deny the application and thereby attempted to evade liability.

In contrast, Defendants argue that they allowed the ASB Council to make a recommendation to the Principal, which is part of the normal procedure in granting a club ASB status. (Tierney Decl., Ex. 11). When the ASB Council recommended denying their Second Application, Plaintiffs filed a lawsuit three days later, but at the same time submitted their revised Third Application a few weeks later. When the ASB Council recommended denying that application, Assistant Principal Anderson informed Plaintiffs in the May 12, 2004 letter that they could pursue additional avenues within the School administration to achieve their desired ASB status. Defendants maintain that, because Plaintiffs chose not to pursue these options, they never received a decision by anyone with final policymaking authority. Consequently, there is no official policy act on which to base § 1983 municipal liability.

Arguably, the Board has delegated its ASB club approval responsibilities to School administrators. One Board member stated that he has never approved ASB clubs in his nine years on the Board. (Second Tyler Decl., Ex. C). Thus, there is arguably a practice of delegating this responsibility to administrators within the School. Assistant Principal Anderson's May 12, 2004 letter bolsters this conclusion. It does not state that Plaintiffs would have to take their appeal directly to the Board. Rather, it states that Plaintiffs could discuss the matter with the Principal, the Superintendent and/or the District Ombudservices' office. It also stated that the "administration here at Kentridge and in the District retains the final oversight role in decisions about ASB clubs." These statements imply that School officials have the final authority to decide ASB-related issues.

Even if this is the case, however, Plaintiffs never sought a final decision from any of these officials. To overcome this problem, Plaintiffs point to Assistant Principal Anderson's deposition, in which he stated that he told the ASB Council that if they voted to recommend granting the Club ASB status, then the School's lawyers would determine if the Club would be allowed; but if they voted to recommend denying the Club ASB status, "it would end it." (Second Tyler Decl., Ex. C). However, even if Assistant Principal Anderson did convey to the ASB Council that a denial by them would "end it," Assistant Principal Anderson is not the final decision-making authority as to this issue. He states in his deposition that he came up with this formulation on his own; no one advised him of it.

(Id.) Therefore, the ASB Council's recommendation that the Club's application be denied cannot be said to constitute an official action by the District and does not trigger § 1983 municipal liability.

While School officials repeatedly referred the matter to the ASB Council and were generally tardy in responding to Plaintiffs' repeated requests, which might suggest that they were channeling the decision-making to the ASB and thereby attempting to insulate the District from liability, Plaintiffs continually changed the nature of the club they wanted approved, even after they filed this lawsuit. The shifting nature of Plaintiffs' proposals warranted repeatedly returning to the beginning of the process, namely the ASB Council's recommendation.

In sum, the District cannot be held liable under § 1983 for any alleged constitutional violations because none of the acts denying the Club ASB status can be attributed to the policymaking authority in the District overseeing the ASB. Because § 1983 "provides remedies for deprivations of rights established elsewhere," City of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985), Plaintiffs' constitutional claims are rightly dismissed on this basis.[9] Tuttle noted that even if a plaintiff has been deprived of a constitutional right, the plaintiff must still establish that the deprivation was caused by a

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[9] Both parties noted at oral argument that Plaintiffs' Equal Access Act claim is not dependent on § 1983 liability and therefore must be addressed on its merits.

governmental body that is liable under the requirements established in Monell. Id. at 817.

Lastly, Plaintiffs maintain that even if the District is not liable under § 1983, the individual Defendants Superintendent Grohe, Principal Albrecht, and Assistant Principal Anderson are liable for their unlawful acts. (Plfs' Resp. at 1 n.2). However, Plaintiffs' Complaint states that each of these three Defendants are sued in their official capacities. (Plfs' Compl., ¶¶ 4.8, 4.13, 4.17). After the Supreme Court in Monell made clear that units within local governments can be liable under § 1983, the Court noted that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell, 436 U.S. at 690-91 & n.55. Thus, "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." Kentucky v. Graham, 473 U.S. 159, 166 (1985). Therefore, Plaintiffs' argument on this issue is without merit.

II. The Equal Access Act

The Court's Order Denying Plaintiffs' Motion for a Preliminary Injunction analyzed the Plaintiffs' Equal Access Act claim and concluded that denying the Club ASB status based in part on its general membership policy did not violate this statute. The parties have not presented any facts that would change this analysis and conclusion. Likewise, Plaintiffs have not presented any legal arguments that persuade this Court that its previous analysis and conclusion were erroneous.

The Equal Access Act ("the EAA" or "the Act") guarantees public school students the right to form noncurriculum groups to engage in religious, political, or philosophical discourse. The Act states:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within the limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a).

Thus, the Act applies only when the school receives federal funding and has created a limited open forum. A limited open forum is defined as allowing one or more noncurriculum-related student groups to meet on school premises during non-instructional time. § 4071(b). Neither party disputes that Kentridge High School receives federal funding and that it has created a limited public forum by granting numerous noncurricular student clubs ASB club status and benefits. (Stewart Decl., Ex. A (listing ASB clubs)). Therefore, the Act applies to Kentridge High School.

The Act prohibits Kentridge High School from denying equal access to or discriminating against students who wish to meet as a noncurricular student club on the basis of the content of the speech as such meetings. The Club was denied ASB status

due, in part, to its exclusionary general membership policy.[10] Plaintiffs have not shown that the Club's exclusionary general membership policy is protected speech under the EAA. Therefore, denying the Club ASB status because of its exclusionary general membership policy does not constitute a denial of equal access or discrimination based on the content of the Club's speech. As such, the School has not violated the EAA.

The Second Circuit addressed this issue in a case with similar facts. Hsu v. Roslyn Union Free Sch. Dist., 85 F.3d 839 (2d Cir. 1996). In Hsu, students applied to their public high school to form a noncurricular religious club. General membership was to be open to all students.[11] Id. at 849. However, the club had proposed a requirement that all officers be "professed Christians though baptism or confirmation." Id. The school rejected the club on the grounds that the club's exclusionary officer policy

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[10] The Club was also denied ASB status due to the Club's exclusionary voting membership policy and objections to the Club's name "Truth." Because the Court bases this Order on the Club's exclusionary general membership policy, the Court need not reach the validity of either of these aspects of the Club or the denial of ASB status based on them under the EAA or constitutional principles.

[11] The club's original application indirectly required that all members be Christians by stating that the club's purpose was to provide time "when Christians gather to praise God." 85 F.3d at 849. The school denied official recognition because of this requirement, among other reasons. In response, the students who initiated the club changed the reference from "Christians" to the more inclusive "people." Id. at 849-50.

violated the school's nondiscrimination policy. Id. at 850.

The school argued that it had not violated the EAA because it did not deny the club official recognition on the basis of the content of the club's religious speech, but rather on the basis of its exclusionary officer policy. The Second Circuit rejected that argument. The court held that the club's exclusionary officer policy as applied to the limited number of officers who led the group in prayer and spiritual songs was protected "speech" under the EAA. It based this conclusion on Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, in which the Supreme Court held that the organizers of an Irish parade in Boston could exclude a gay, lesbian, and bisexual group from marching in the parade with a banner expressing their pride in their Irish heritage as openly gay, lesbian, and bisexual people. 515 U.S. 557 (1995). Hurley observed that the message a group imparts can depend on the group's ability to exclude those who might broadcast a contradictory message. Therefore, the ability to exclude such people is protected under the First Amendment's freedom of expressive association. Id. at 574. In Hsu, the religious club's constitution indicated that certain officers would be required to lead and perform the club's religious speech in prayer and song. Therefore, the club's exclusionary officer policy was statutorily protected "speech" because the policy was a way to assure that only a certain type of religious speech would occur at the meetings. The court held that it was acceptable to require that such officers be "professed" Christians only to the extent that there was an

"integral connection between the exclusionary leadership policy and the religious speech at their meetings." Hsu, 85 F.3d at 857. By concluding that the exclusionary officer policy applied to these limited officer positions was statutorily protected "speech," the school's denial of official recognition was based on the content of the speech. As such, the school had violated the EAA.

Using the same analysis, the court found that there was no similar reason to justify the club's requirement that officers whose duties did not involve leading the club in prayer or song be "professed" Christians. Notably, the court concluded that such a requirement would be akin to imposing a religious test for membership or attendance, which the court concluded would be "plainly insupportable." Id. at 857-58. "It is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the [c]lub's speech." Id. at 858 n.17. Therefore, the club's exclusionary officer policy for those positions was not statutorily protected speech. As such, the school did not violate the EAA by conditioning approval of the club on eliminating the exclusionary policy for those secondary officer positions. This conclusion is consistent with Hurley. Hsu correctly read Hurley as allowing the exclusion of people who intended to broadcast a particular message that was contrary to the group's message. Id. at 856. Hurley did not address whether the parade organizers could exclude all gay, lesbian, and bisexual people as individual participants in the parade. Hurley, 515 U.S. at 572.

Here, the Club's general membership policy goes far beyond the officer policy upheld in a limited fashion in Hsu. There is no indication that the Club's general members will control the Club's speech; they have no direct control over the prayer and study that will occur at Club meetings, the election of the Club's officers who are responsible for prayer and study at the meetings, or the Club's constitution. Instead, the exclusionary general membership policy is the type of religious test for membership[12] that Hsu indicated would be "plainly insupportable." As such, the exclusionary general membership policy is not statutorily protected speech. Denying the Club ASB status based in part on this policy does not violate the EAA. Plaintiffs argue that it is nonetheless violates the First Amendment right of expressive association.

III. First Amendment Right of Expressive Association

Even if the Court's conclusion that Defendants cannot be held liable under § 1983 for alleged constitutional violations were deemed erroneous, Defendants have not violated Plaintiffs' First Amendment right of expressive association. While the Club has a First Amendment right to expressive association, which includes the right to exclude

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[12] Plaintiffs argue that the general membership policy is not a "religious belief' requirement, but rather a code of conduct based on religious beliefs as determined by the Club's voting members and leadership. As discussed more thoroughly below, the Court concludes that this is a distinction without a meaningful difference.

general members based on religion, the School can justifiably limit that right in order to further a legitimate and compelling interest in not allowing an ASB club to discriminate on the basis of religion. The Court's Order Denying Plaintiffs' Motion for a Preliminary Injunction analyzed the Plaintiffs' First Amendment right to expressive association and reached this conclusion. Plaintiffs have presented additional arguments on this issue in their Motion for Summary Judgment. Despite those arguments, however, the Court reaches the same conclusion that it reached previously.

Implicit in protected First Amendment activities is a corresponding right to associate with others in pursuit of religious and other ends. Roberts v. United States Jaycees, 468 U.S. 609,622 (1984). Forcing a group to accept members it does not wish to accept may impair the group's ability to express its unique views and to refrain from expressing views with which it disagrees.

Consequently, the freedom of association encompasses a freedom not to associate. Id. at 623. In the context of student clubs on college campuses, denying them official recognition without justification burdens the student club's associational rights. Healy v. James, 408 U.S. 169, 181 (1972).

Plaintiffs rely on Democratic Party v. Wisconsin, 450 U.S. 107 (1981), New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988), and Jaycees to support their argument that they have a right of association which allows them to exclude students from voting membership and general membership on the basis of religion. In

Democratic Party, Wisconsin had an open primary, allowing anyone to vote for a Democratic nominee. The National Democratic Party challenged the law because it violated the Democratic Party's rules limiting voting in primaries to voters who publically declared affiliation with the Party. The Court acknowledged that the state had a legitimate compelling state interest in encouraging voter participation. 450 U.S. at 121. However, it held that the state could not then compel the Party to seat the delegation elected in a manner contrary to the Party's exclusionary voting rule. The freedom to associate to advance political beliefs includes the right to limit membership in the association. The forced inclusion of people not affiliated with the political party "may seriously distort [the party's] collective decisions - thus impairing the party's essential functions – and . . . political parties may accordingly protect themselves from intrusion by those with adverse political principles." Id. at 122.

In New York State Club Ass'n, plaintiffs brought a facial challenge to a state law prohibiting discrimination in public accommodations. The state law prevented an association from using race, sex, or creed (among others) to exclude membership, but did not prevent groups from employing "legitimate criteria for determining membership." 487 U.S. at 13. The Court found the law passed constitutional muster. At the same time, the Court contemplated that an association might be able to show that "it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for

example, or the same religion." Id. In light of these holdings, it appears that the Club may have a First Amendment right in expressive association to exclude general members based on religion.

A. Limits on the Right to Expressive Association

Nonetheless, it is well established that the right of association is not absolute. A compelling state interest unrelated to the suppression of ideas can justify limiting the right of association as long as the interest cannot be served through less restrictive means. Jaycees, 468 U.S. at 623. The Jaycees were an educational and charitable nonprofit that promoted the interests of young men. A state law required that the Jaycees accept women as voting members. While the Court recognized that the law intruded into the internal structure of the association by forcing it to accept members it did not desire to accept, the Court concluded that the intrusion was justified by the state's compelling interest in eradicating discrimination against women. Id.

In this case, there is a legitimate and compelling state interest in having public schools provide equal opportunity and treatment to all students to participate in school activities programs without regard to religion, race, or sex (among other things). The School District's nondiscrimination Policy 3210 is designed to further this compelling

state interest.[13] It states "[t]he district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color, national origin, [or] sex. . . ." (Tierney Decl., Ex. 7). Providing equal opportunity and treatment includes providing all students with equal access to student clubs allowed to operate on campus. Therefore, Policy 3210 prohibits denying individual students access to student activities programs such as student clubs on the basis of religion. It is particularly important in the public school context to prevent race, religion, or sex-based exclusion or discrimination in the provision of school benefits and programs. Preventing discrimination against these uniquely protected classes addresses past discrimination that our country has struggled to overcome. A public school must not only prevent such discrimination, but has an affirmative obligation to provide access to all of the school's activities for all students regardless of their religion.

Plaintiffs present two arguments to support their contention that the Club does not exclude students from participation in the Club on the basis of religion. Neither are persuasive. First, under the Club's three-tier membership system, students of all or no religious beliefs may attend as "attendees." (Plfs' Mot. at 10-11). This relies on Plaintiffs' new

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[13] As Defendants' point out, this interest is derived from the broader state-wide interest in preventing discrimination in public accommodation based on religion, race, sex, national origin, or disability, as manifested in RCW 49.60 et seq.

assertion that there are three categories of students who may participate in the Club's activities. However, this assertion is not set forth anywhere in their Third Application materials. Their Third Application materials refer to only two categories of students as participants - general members and voting members. In Plaintiffs' pleadings and at oral argument, Plaintiffs pointed to language in their First and Second Applications to support their assertion that the Club has this three-tiered membership system. However, Plaintiffs cannot have it both ways; they cannot demand ASB status for the Club as proposed in their Third Application, which is materially different from their two previous applications, and at the same time rely on language in those two previous applications to support their demand.

Second, Plaintiffs argue that the general membership policy refers to a code of conduct, not religious beliefs. Plaintiffs made this general argument in their Motion for Reconsideration of the Preliminary Injunction Order. The Court rejected it, stating that a student interested in joining the Club as a general member would have to determine what constitutes Christian character, speech, and conduct, which necessarily requires delving into religious beliefs. Plaintiffs now claim that the Club's voting members and leadership would determine what this Christian code of conduct is, based on their religious beliefs. According to Plaintiffs, students of any religion may become general members as long as their conduct conforms to the code of conduct as established by the Club's voting members and leadership. (Plfs' Mot. 11-12). However, while the

voting members and leadership may determine what they believe constitutes Christian conduct and speech, other students wishing to join as general members may have different beliefs regarding Christian conduct and speech, conduct themselves accordingly, and maintain that they have complied with the Club's code of conduct. The distinction between the two codes of conduct necessarily requires delving into religious beliefs. Exclusion is based those who hold different religious beliefs. This points to the fatal flaw in Plaintiffs' argument that the Club is no different from the numerous other ASB clubs that condition membership on certain codes of conduct. None of those clubs' codes of conduct are explicitly based on religion (let alone one group's interpretation of one religion). Some clubs require that students have good character or act virtuously. Good character, virtuous behavior, or moral conduct does not demand or require interpretation of religious principles.[14] What is "Christian" conduct varies widely from sect to sect, from church to church, or even from individual to individual, and necessarily embroils one in discussions of religious dogma.

Despite Plaintiffs' arguments to the contrary, granting the Club ASB status with its exclusionary general membership policy would violate the School's non-discrimination policy because it would

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[14] The fact that the District Superintendent stated that, in her view, "immoral conduct" is based in part on principles outlined in various religious texts is not relevant to this analysis.

deny individual students the opportunity to participate in the Club based on their religion. Therefore, the School's compelling interest in preventing discrimination based on religion justifies intruding upon the Club's right to expressive association. As required by the Jaycees, the School's denial of ASB status is not aimed at the suppression of the Club's speech or ideas; it is aimed at preventing violation of the School's nondiscrimination policy.[15] Additionally, Policy 3210 is sufficiently narrowly tailored. For example, it would not justify the School's denial of a politically-oriented student club that restricted general membership based on political ideology. In that instance, the club's right to expressive association would not discriminate based on race, religion, sex, or national origin. As such, the club's exercise of its expressive association would not undermine the School's legitimate interest in enforcing its non-discrimination policy. Consequently, the School could not rely on Policy 3210 to limit the club's right to expressive association.

This conclusion is consistent with the Supreme Court's decision in Boy Scouts of America v. Dale, 530 U.S. 640 (2000). Boy Scouts limited Jaycees by holding that a state could enforce its public accommodations statute at the expense of a group's right of association only when doing so would

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[15] It is worth noting that there are two religious clubs that have ASB status at other schools in the District. Neither of these clubs exclude members based on religious belief or conduct.

not materially interfere with the ideas that the organization seeks to express. Id. at 657-58. The Jaycees' message was unrelated to gender. Therefore, forcing the Jaycees to accept women did not materially interfere with the Jaycees' message. In contrast, the Court held that the Boy Scouts could exclude a homosexual as a scoutmaster because the presence of an openly gay scoutmaster would undermine or distort the Boy Scout's moral and religious "message" that it intended to inculcate in its members. Id. at 653. Therefore, the state could not force the Boy Scouts to accept gay scoutmasters under the state's public accommodations law. Id. at 658. The Court noted that this result was consistent with Hurley. Even still, the Court noted that expressive association could not be used as a shield against antidiscrimination laws by simply asserting that acceptance of a certain type of member would impair the group's message. Id.

Here, there is no indication that inclusion of students of differing religious faiths and differing versions of the Christian faith as general members will materially interfere with the Club's expression of its ideas. The general members do not control the Club's Bible study and prayer functions. They do not lead the Club in its spiritual activities, nor do they dictate or control the other members' religious beliefs. If the Club were forced to open general membership to all students, the Club could still expound upon its particular religious beliefs, including for example the idea that only certain beliefs, conduct, and speech are truly Christian.

Plaintiffs' argument to the contrary is not persuasive. Plaintiffs argue that excluding students who do not comply with the general membership religious requirement is necessary for the Club's purpose and effectiveness. (Plfs' Mot. at 8-10). Plaintiffs cite a particular passage in Jaycees, in which the Supreme Court observed that forcing the Jaycees to include women would not impede the group's ability to promote the interests of men and would not impose any restriction on the group's ability to exclude people of different ideologies or philosophies. (Plfs' Mot. at 9). Plaintiffs maintain that they are a private organization that has a right to limit its membership based on religious ideology because that religious ideology is integral to the Club's purpose.[16] First, even if the Club, viewed in isolation, is a private organization, the very ASB status it seeks is part of the provision of benefits that the public school provides to students. Washington law requires schools to control the operation of, and oversee, ASBs and their activities. See RCW 28A.325.020, WAC 392-138-013(1). Thus, the Club is not a purely private organization.

Moreover, Hsu recognized that the school context requires a unique balancing of interests. Hsu held that a religious club could exclude students from core leadership positions on the basis of religion because those leadership positions were

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[16] The Court notes that Plaintiffs' argument that they have a right to exclude general members based on ideology or beliefs contradicts their earlier argument that their general membership policy does not exclude on the basis of belief but only on the basis of conduct.

important to the club's expression of its religious ideas. But it also held that the club could not exclude students from non-core leadership positions. Here, the Club's general membership exclusion is even more restrictive and has no integral connection to the Club's expression of its religious ideas. As such, the School can rightfully prioritize the School's legitimate interest in providing all students access to all student clubs without regard to the students' religious beliefs over the Club's interest in excluding such students as general members.

Boy Scouts and Hurley are further distinguishable from this case on a number of grounds. First, they are limited by the fact that homosexuals are not a protected class under current law. Unlike in the Jaycees, there is no corresponding compelling state interest in preventing discrimination against gay and lesbian citizens. In this case, however, there is a compelling state interest in providing equal treatment to students of all religious faiths, as discussed above. Additionally, both Hurley and Boy Scouts confronted a situation where the forced inclusion did not apply to general participants or members but rather of those who would broadcast a message contrary to the group's intended message. In Hurley, the contrary message would have been broadcast outwardly to the public in the Boston parade by banners displayed during the parade. In Boy Scouts, the contrary message would have been broadcast inwardly to the rest of the Boy Scout members by a scoutmaster acting in a leadership position. Neither are like the situation here. General members of the Club are merely participants, not

leaders. Lastly, neither Boy Scouts nor Hurley occurred in the public school context.

Finally, Plaintiffs argue that the only way the School may justifiably prohibit the Club from excluding voting members based on religion is if such exclusion constitutes invidious discrimination. Plaintiffs cite Hsu as standing for the general rule that

> When a sectarian club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so unless that club's specific form of discrimination would be invidious (and would thereby violate the equal protection rights of other students), or would otherwise disrupt or impair the school's educational mission.

Hsu, 85 F.3d at 872-73. Plaintiffs seem to ignore the part of Hsu that held that the school could justifiably prohibit the religious club from requiring that officers who had no control over the club's message or speech be professed Christians. The court noted that this would be akin to a general membership requirement, which it deemed "plainly insupportable." The court reached this conclusion without going through any invidious discrimination analysis.

Because the Court concludes that Defendants may justifiably limit Plaintiffs' right to expressive association by withholding ASB status to the Club based on its religious-based exclusionary general membership policy, the Court need not reach the

parties' arguments under Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), regarding whether granting the Club ASB status would cause material disruption to the School's educational mission. Likewise, because Plaintiffs' cursory Equal Protection Clause, Establishment Clause, and Free Exercise Clause arguments are all subsumed within their First Amendment argument, the Court's need not explicitly address these arguments. Lastly, in light of the Court's holding, the Court need not reach Defendants' Establishment Clause argument.

CONCLUSION

The Court GRANTS Defendants' Motion for Summary Judgment and DENIES Plaintiffs' Motion for Summary Judgment. Defendants are not liable under § 1983 for any alleged constitutional violations. Even if they were, Defendants' actions have not violated Plaintiffs' constitutional rights. Likewise, Defendants' actions have not violated the Equal Access Act.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: September 23, 2004

/s/ Marsha Pechman
Marsha J. Pechman
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRUTH, an unincorporated association; et al., Plaintiffs - Appellants, v. KENT SCHOOL DISTRICT; et al., Defendants - Appellees.	No. 04-35876 D.C. No. CV-03-00785-MJP Western District of Washington, Seattle ORDER

Before: WALLACE, WARDLAW, and FISHER, Circuit Judges.

Judge Wardlaw and Judge Fisher have voted to deny the Petition for Rehearing En Banc, and Judge Wallace so recommends.

The full court was advised of the Petition for Rehearing En Banc. A judge of the court requested a vote on whether to rehear the case en banc, but the request failed to receive a majority of the votes of the nonrecused active judges in favor of en banc rehearing.

Appellant's Petition for Rehearing En Banc is DENIED.

BEA, Circuit Judge, dissenting from the denial of rehearing en banc, joined by O'SCANNLAIN, Circuit Judge:

A Christian Bible study group named "Truth" sought official recognition by a high school. Such recognition would entitle the group to use school rooms to hold lectures and discussions regarding the Bible and its teachings. Any group so recognized could also apply to use school materials and supplies to spread its message, at reduced prices. The school refused official recognition to Truth because it viewed Truth's requirement that members comply "'in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible'" as being discrimination based on religion. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 639 (9th Cir. 2008). The government's ability to regulate membership in a discussion group is the ability to regulate the viewpoint of the group. This case merited en banc review because a state school district should not require a Christian Bible study group to allow into its group non-Christians and Christians alike, as a condition for providing its school facilities and support. Yet this is what the majority concurrence[17] now holds. It reached that result by confusing the school's viewpoint-neutral right to limit speech in a limited public forum with a necessarily viewpoint-affecting regulation of the right freely to associate to express one's views.

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[17] What I object to is contained in the panel's "concurrence" signed by Judges Fisher and Wardlaw. This is no standard concurrence, however, because two of the three members of the panel concur in it. Thus, it is the opinion of the panel on this issue and creates binding precedent. *See* G.O. 4.5 ("[T]he determination of each appeal . . . shall be evidenced by a written disposition concurred in by a majority of the panel assigned to act thereon.").

No one argues a school cannot limit *what* topics student groups can discuss on campus. It is quite another thing to dictate *who* must be allowed into membership, so to affect the group's expression of viewpoints on such topics.

Unfortunately, the majority concurrence does just that: it tells the Christian Bible study group that because its membership is open only to those who comply "'in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible,'" the School District can refuse to extend the benefits which go with its official recognition of the Club. *Truth*, 542 F.3d at 639. The majority concurrence does this by mistakenly applying the law relating to permissible restrictions in "limited public forums," rather than applying the required law of "expressive associations." Because the majority concurrence makes circuit law, and because it is contrary to Supreme Court rulings and creates a circuit split with the Seventh Circuit, this case merited en banc review; I must dissent from the denial of rehearing en banc.

Discussion

The majority concurrence seems to reason that if the school can reasonably regulate the topics to be discussed by a group or the groups who can discuss such topics, it can regulate the membership of such groups.

Yet regulation of such topics and groups can never be based on the *viewpoints* to be expressed. That much the majority concurrence admits.[18] That is, the school could decide to ban all groups that wish to speak on abortion, on the ground the subject is not within the description of the purpose of a limited public forum dedicated to discussion of campus activities. What it could not do is allow speech only to pro-life speakers, but not allow it to proponents of abortion on demand.

Government action that infringes on the right of expressive association is subject to strict scrutiny: The government must show that its restriction is "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (internal citation and quotation marks omitted). By contrast, government action that infringes on the right of free speech in a limited public forum such as a school, is subject to a lower level of scrutiny. The government can "reasonably" regulate topics so long as the restrictions are viewpoint neutral. It can also regulate the time, place and manner of speech.

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[18] The majority states: "As our opinion explains, when the state creates a *limited* public forum, like the ASB program at issue here, it may restrict access to that forum so long as the restrictions are 'viewpoint neutral and reasonable in light of the purpose served by the forum,' even if these rules have the effect of limiting a group's ability to engage in protected speech, such as the right to speak, publish on a particular topic or engage in expressive association." *Truth*, 542 F.3d at 651 (Fisher, J. and Wardlaw, J., concurring).

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–29 (1995). By applying the limited public forum test to the Club's right to decide who its members will be, the majority concurrence has lessened the scrutiny placed on restrictions of the right of expressive association.

Henceforth, school groups in this circuit will not be able to exclude unwanted members from groups formed for expressive association, if the school authorities have some "reasonable" basis upon which to limit their ability to exclude members. Such denial of the groups' right of exclusion will neither have to be justified by any compelling interest of the school, nor narrowly tailored to restrictions needed only to advance that interest, contrary to Supreme Court precedent.

I. The majority concurrence's holding fails to follow binding Supreme Court precedent.

The essential problem with the majority is that it applies a *Rosenberger* "free speech" analysis (when the content of the speech is known and is outside a reasonably set topic area) to what is a *Dale* "freedom of association" case (which deals with the formulation of the content of such speech).

The majority concurrence held the School District was restricting only "access" to a limited public forum because of the subject matter to be discussed. *See Rosenberger*, 515 U.S. at 828–38 (holding that in a limited public forum such as a high school, the school can "reasonably" regulate

topics of discussion so long as the restrictions are viewpoint neutral); *Truth,* 542 F.3d at 651 (Fisher, J. and Wardlaw, J., concurring). But this is not what happened. The School District told the Club that it could not be recognized because it required its members to comply "'in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible.'" *Truth,* 542 F.3d at 639. Thus, it was telling the Club how its expression must be determined. In doing so, the majority's holding flies directly in the face of Supreme Court precedent. "The forced inclusion of an unwanted person [Here, a non-Christian in a Christian Bible study group] in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648.

In *Dale*, a scout leader was fired from the Boy Scouts once the Scouts discovered Dale was actively involved in the homosexual rights movement. 530 U.S. at 644–45. The Court held "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653. Thus, Dale's presence would "interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Id.* at 654. *Dale* is not only illuminating, it is determinative of this case. The same test applied in *Dale* should apply here.

In *Dale*, the Court stated:

> In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), we observed that implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. *See ibid.* (stating that protection of the right to expressive association is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority). Government actions that may unconstitutionally burden this freedom may take many forms, one of which is intrusion into the internal structure or affairs of an association like a regulation that forces the group to accept members it does not desire. Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, freedom of association plainly presupposes a freedom not to associate.

Id. at 647–48 (citations, internal quotation marks, and brackets omitted).

As was the case of the Boy Scouts, the school district here "at the very least" forces the Christian Bible study group to send a message that its agenda, discussions, and meetings can be framed, and their content determined, by non- Christians.

Another form of interference with the right of expressive association was involved in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). There, Massachusetts law was applied to force the inclusion of homosexuals and bisexuals to participate in a St. Patrick's Day parade organized by a separate group. The Court found this forced association would alter the parade organizers' intended message. *Id.* at 573. Hence, the forced presence of the homosexual contingent would have a substantial effect on the content of the association's expression and violated the association's First Amendment right to expressive association. If forced inclusion of unwanted marchers has a "substantial effect" on the group's intended message, how much more so does the forced inclusion of non-believers to direct the message given by a religious group to its members and the public?

Further, the majority concurrence fails to discuss the seminal case of *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1980), where the Court held Wisconsin could not order the Democratic National Convention to have the Wisconsin delegation vote for the candidate who had won the Wisconsin primary. Why? Because the Wisconsin primary was an "open" primary, which allowed *all* voters, not just publicly professed and

registered Democrats, to vote for Democratic candidates. Rule 2A of the National Democratic Convention allowed for seating of (and voting by) delegates only if the delegates were publicly professed and registered Democrats. *Democratic Party*, 450 U.S. at 109. The Court said:

> This First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State. And the freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.

Id. at 121–22 (citations omitted).

In *Democratic Party*, the National Democratic Party "expressed the concern that 'a full opportunity for all Democrats to participate is diluted if members of other political parties are allowed to participate in the selection of delegates to the Democratic National Convention.'" *Id.* at 116–17.

Change the name "Democrat" to "Christian" and the same reasoning applies here. A full opportunity for professed Christians to participate in the direction of Club affairs is "diluted" if members of other faiths—or persons without any religious faith—must have a voice in the group's expression.

Just as the issue in *Democratic Party* was whether the State could compel the National Democratic Party to seat a delegation chosen in a way that violated the Party's rules, the issue here is whether the School District can, as a condition of its "acknowledgment" (recognition), compel the Club to choose its members in a way that violates the Club's rules. The answer was "NO" in *Democratic Party, id.* at 126, and should be "NO" here.

II. Governmental infringements upon the right to expressive association are reviewed under strict scrutiny, not a limited public forum analysis.

Unfortunately, the majority concurrence ignored the reasoning which underpins the right of expressive association: that it helps to protect the ability to exercise all the other First Amendment rights, such as freedom of speech and the free exercise of religion:

> The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden by regulations adopted to serve *compelling state interests*, unrelated to the suppression of ideas, that cannot be achieved through means

> *significantly less restrictive* of associational freedoms.

Dale, 530 U.S. at 647–48 (2000) (citations, internal quotation marks, and brackets omitted) (emphasis added).

Despite this clear mandate, the majority concurrence stated that "when the state creates a *limited* public forum, . . . it may restrict access to that forum so long as the restrictions are 'viewpoint neutral and reasonable in light of the purpose served by the forum,' even if these rules have the effect of limiting a group's ability to . . . engage in expressive association." *Truth*, 542 F.3d at 651 (Fisher, J. and Wardlaw, J., concurring). Further, the majority concurrence holds that "we apply the lesser standard of scrutiny, even if the same burden on a group's rights *outside* a limited public forum would be subject to strict scrutiny." *Id.* at 652 (Fisher, J. and Wardlaw, J., concurring). The majority concurrence relies on *Rosenberger* for this proposition.

In *Rosenberger*, the University of Virginia withheld authorization for payments to a printer on behalf of a student-run newspaper because the newspaper promoted religious beliefs. 515 U.S. at 827–28. There was no claim the University required the group to determine what it wanted printed by persons who did not share the group's beliefs. The newspaper sued, raising *only* a free speech claim, *not* an expressive association claim. *Id.* Thus, the majority concurrence's reliance on *Rosenberger* is misplaced.

Furthermore, the majority concurrence's opinion causes an inter-circuit split with the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). In *Walker*, the dean of a public law school revoked the official status of the Christian Legal Society chapter at the law school because the Society's membership policy, which excluded from membership those who refused to sign a statement of faith, violated the law school's anti-discrimination policy. 453 F.3d at 857. Although the Society allowed anyone to attend its meetings, only those who signed the statement of faith were permitted to be voting members and officers of the organization. *Id.* at 858.

The Society sued, raising expressive association and free speech claims. The court analyzed the two claims separately, applying strict scrutiny to the expressive association claim and the limited public forum analysis to the free speech claim. *Walker*, 453 F.3d at 861–67.

The *Walker* court reversed the district court's denial of an injunction restoring the official status of the Society. It first ruled the Society had demonstrated probability of success on its "expressive association" claim; the law school had withdrawn official status solely on the grounds that the Society required its controlling membership and officers to abjure homosexual conduct, a claimed violation of the school's anti-discrimination rules. As such, the school's rules were found to violate the Society's right to select its members who would significantly affect the Society's expression.

The *Walker* court then turned to the free speech claim. It held that even if official status recognition afforded only "limited public forum" availability, the record compelled a finding the Society was not granted equal protection. The school had allowed Muslim, Adventist and other groups to exclude controlling membership on the basis of beliefs conflicting with the central tenets of the organizations.[19] The circuit court issued an injunction ordering restoration of the Society's official status.

Curiously, the majority concurrence acknowledges the Seventh Circuit applied strict scrutiny to the expressive association claims, but claimed it did so because it could not determine whether the university had created an open, limited or nonpublic forum. *Truth*, 542 F.3d at 652 n.1 (Fisher, J. and Wardlaw, J., concurring) ("Although the Seventh Circuit applied strict scrutiny in addressing this claim, it notably stated that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum."). This is an error that can be made only by a partial reading of the *Walker* decision. The *Walker* court actually wrote:

> Whether SIU [the school in question]'s student organization forum is a public, designated public, or nonpublic forum is an

---

[19] Of course, the majority's opinion differs from *Walker*'s in that it remanded to the district court for factual development of whether the School District was denying Equal Protection rights to Truth by "acknowledging" groups which discriminated on bases other than religion (i.e., gender) which bases were also prohibited by the school discrimination policy.

> inquiry that will require further factual development, and that is a task properly left for the district court. *But even assuming at this state of the litigation that SIU's student organization forum is a non-public forum-making the lowest level of scrutiny applicable—we believe CLS has the better of the argument.*
>
> * * *
>
> Whether the policy is reasonable in light of the purposes the forum serves cannot be determined on this record because we do not know precisely what those purpose are (we could speculate, but that would be inappropriate). *We need not reach this aspect of the inquiry, however, given our conclusion that CLS has demonstrated a likelihood of success on its claim that SIU is applying its policy in a viewpoint discriminatory fashion. SIU has singled out CLS for derecognition. The record may be spartan, but every part of it right now points to success for CLS.*

453 F.3d at 866–67 (emphasis added).

The *Walker* court determined that even if the free speech claim were tested under the lowest scrutiny of the "reasonableness" test, the Society was still entitled to its injunction. To say that the Seventh Circuit did not rule on the expressive association claim because it could not rule on the free speech claim is not only a *non sequitur* because

the two claims are distinct; it is a flat-out misrepresentation.

Walker is on all fours with our case. The majority concurrence clearly establishes a circuit conflict.

Conclusion

The majority concurrence correctly recognized that Free Speech regulation of a school's group cannot turn on the viewpoint the group expresses. But by permitting the school to regulate the *membership* which controls the group's expression, it ineluctably controls the group's viewpoint—"personnel *is* policy."[20] From this error, the majority concurrence logically assesses the school action by a "reasonable relation" test rather than the "strict scrutiny" test, which expressive association requires under the First Amendment. For both these reasons, and because the majority concurrence's opinion clashes with a Seventh Circuit case involving similar non-Christian membership requirement in a Christian group, en banc rehearing should have been granted. I must respectfully dissent from the order denying en banc review.

---

[20] Herbert E. Meyer, *Personnel is Policy*, Feb. 4, 2007, http://www.americanthinker.com/blog/2007/02/personnel_i _policy.html, referring to Herbert E. Meyer in the Reagan administration. For a more recent thought in the same vein, *see* Thomas B. Edsall, *The Obama Test: Personnel is Policy*, October 24, 2008, http://www.huffingtonpost.com/2008/10/24/the-obama testpersonnel_n_137757.html.

WARDLAW and FISHER, Circuit Judges, concurring in the denial of rehearing en banc:

We write to address significant inaccuracies in Judge Bea's dissent from rehearing en banc.

As the unanimous opinion made clear, this case is not about the school's recognition of Truth as a school group, but the school creating Truth "as a *school-sponsored* group." *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 648 (9th Cir. 2008). Our concurrence amplified this point, explaining that the government is not required to subsidize expression, including expression through expressive association, within limited forums of its own creation as long as it restricts access to the forum according to reasonable, viewpoint-neutral rules. *See* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1938-44 (2006) (arguing that the government is not obligated to support expressive association, and only must not discriminate based on viewpoint).

Additionally, we have not created a circuit split with *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). In *Walker*, the Seventh Circuit held that the Christian Legal Society showed a likelihood of success on free speech and expressive association claims. In our concurrence, we noted that the Seventh Circuit explicitly stated "that it could not even determine, on the limited record before it, whether the university had created an open, limited, or nonpublic forum." *Truth*, 542 F.3d at 652 n.1

(Fisher & Wardlaw, JJ., concurring). We did not, as Judge Bea asserts, say that the Seventh Circuit applied strict scrutiny to SIU's alleged violation of CLS's expressive association rights "*because* it could not determine" what type of forum was created. Dissent at 12 (emphasis added). The unanimous opinion's holding is entirely consonant with the Seventh Circuit: we agreed that viewpoint discrimination is always prohibited no matter what type of forum exists and remanded Truth's claim that Kent School District applied its nondiscrimination policy in a selective and discriminatory manner for further investigation by the district court.

United States Code Annotated
Title 20. Education
Chapter 52. Education for Economic Security
Subchapter VIII. Equal Access

§ 4071. Denial of equal access prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that--

(1)the meeting is voluntary and student-initiated;

(2)there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3)employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4)the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5)nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof--

(1)to influence the form or content of any prayer or other religious activity;

(2)to require any person to participate in prayer or other religious activity;

(3)to expend public funds beyond the incidental cost of providing the space for student-initiated

meetings;

(4)to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5)to sanction meetings that are otherwise unlawful;

(6)to limit the rights of groups of students which are not of a specified numerical size; or

(7)to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

CREDIT(S)

(Pub.L. 98-377, Title VIII, § 802, Aug. 11, 1984, 98 Stat. 1302.)

Current through P.L. 111-1 approved 1-16-09

United States Code Annotated
Title 20. Education
Chapter 52. Education for Economic Security
Subchapter VIII. Equal Access

§ 4072. Definitions

As used in this subchapter--

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

CREDIT(S)

(Pub.L. 98-377, Title VIII, § 803, Aug. 11, 1984, 98 Stat. 1303.)

Current through P.L. 111-1 approved 1-16-09

United States Code Annotated
Title 20. Education
Chapter 52. Education for Economic Security
Subchapter VIII. Equal Access

§ 4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

CREDIT(S)

(Pub.L. 98-377, Title VIII, § 804, Aug. 11, 1984, 98 Stat. 1304.)

Current through P.L. 111-1 approved 1-16-09

United States Code Annotated
Title 20. Education
Chapter 52. Education for Economic Security
Subchapter VIII. Equal Access

§ 4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

CREDIT(S)

(Pub.L. 98-377, Title VIII, § 805, Aug. 11, 1984, 98 Stat. 1304.)

Current through P.L. 111-1 approved 1-16-09.

3210

NONDISCRIMINATION

The district will provide equal educational opportunity and treatment for all students in all aspects of the academic and activities program. Equal opportunity and treatment is provided without regard to race, creed, color, national origin, sex, marital status, previous arrest unless a clear and present danger exists, incarceration, or physical, sensory or mental disabilities.

The superintendent shall provide for the annual evaluation, periodic surveys, annual notice and complaint procedures as required by law to ensure that there is equal opportunity for all students in the district.

The superintendent shall designate employees to serve as affirmative action officer and the Title IX compliance officer.

Cross References:

Board Policy	2121	Curriculum Adoption
	2150	Cocurricular Program
	2311	Instructional Materials

Legal References:

RCW	28A.640	Sexual Equality Mandated for Public Schools

	49.60	Law Against Discrimination
	42 U.S.C. §§ 12101-12213	Americans with Disabilities Act
WAC	180-40-215	Student Rights
	392-190	Equal Educational Opportunity—Sex Discrimination Prohibited
	34 CFR Part 104	Rehabilitation Act of 1973, Section 504

Adopted By Board: 6/22/94

Revised By Board: 5/12/99

http://www.kent.k12.wa.us/district/policies/2310.html 3/31/2000

KENTRIDGE HIGH SCHOOL

CLUB CHARTER APPLICATION

Kentridge clubs provide academic, social and athletic opportunities and experiences. All Kentridge clubs must be chartered prior to any fund raising activities. The following steps will be involved in the chartering process.

1. All prospective clubs must complete a Kentridge Club Charter Application. The application may be obtained in the Activities Office.

2. The completed application should be turned in to the Activities Coordinator.

3. The application is reviewed by the ASB and Activities Coordinator. A recommendation is the presented to the Principal.

4. The membership list is reviewed to verify that all members have purchased an ASB card.

5. The applicant is notified for the approval or denial of the request.

6. All chartered clubs and activities (sports) must perform a school/community service.

All clubs are expected to follow district/school policies; clubs failing to adhere to these standards may have their charter revoked.

CLUB NAME: Truth DATE: 4-24-03

PURPOSE: To study the Bible and the Gospel of Christ and to associate with other believers in Christian fellowship wherein our faith may be expressed to those in the club as well as those outside of the

AMOUNT OF MONEY YOU NEED TO FUNCTION THIS YEAR: $50

HOW DO YOU INTEND TO RAISE THIS MONEY? (be specific)

1. From voluntary contributions of the members.

2. From ASB funds as allocated to ASB approved clubs.

FUNCTIONS YOU INTEND TO PERFORM FOR THE SCHOOL: Providing a biblically based club for those wanting to 1) Grow in their relationship with Jesus Christ, 2 Study the Bible, 3) Associate in fellowship with other Christians, and 4) Express the love of Christ and His soul-saving grace through character, speech, conduct and behavior.

SCHOOL/COMMUNITY SERVICE: Volunteering at Union Gospel Mission (or similar organizations) approximately 2 times per year.

MEMBERSHIP CRITERIA: A true desire to study the Bible and grow in a relationship with Jesus Christ. Only those

willing to sign the statement of faith may be voting members.

ADVISOR'S SIGNATURE: _____

CLUB OFFICERS:

CONSTITUTION ON FILE: Attached

PRESIDENT: To be voted on

SECRETARY: To be voted on

TREASURER: To be voted on

OTHER OFFICERS: To be voted on

A CURRENT MEMBERSHIP LIST MUST BE ATTACHED TO THE APPLICATION (to be voted on)

****

APPROVED ____ DENIED ____ DATE: _____

ASB PRESIDENT: _____

ACTIVITIES COORDINATOR: _____

Student Club Constitution
TRUTH CONSTITUTION

Article I

The name of this club shall be known as Truth.

The following scriptures provide inspiration and support for the name "Truth."

John 8:32 Speaking to the believing Jews, he says that if they hold to His teachings, they're really his disciples. He says, "Then you will know the truth, and the truth will set you free."

Psalm 26:3 "for your love is ever before me, and I walk continually in your truth." In this Bible club, we'll strive to learn how to walk in the plan God has set out for us, and learn how to follow Him, and "walk in His truth".

Psalm 43:3 "Send forth your light and your truth, let them guide me..."

Article II
General Purposes

The general purpose of Truth is to provide an opportunity for students to meet together during noninstructional time to study the Bible and to teach the Gospel of Jesus Christ. Truth seeks to succeed at the following purposes:

1. To provide education about the Bible.
2. To provide information to all about Jesus Christ.
3. To provide a positive Christ-like atmosphere where students can meet.

The following scripture provides inspiration for meeting with the purpose of studying the Bible and Jesus Christ.

Matthew 18:20 "For where two or three come together in my name, there am I with them.

Article III
Membership

Any student truly desiring to participate in the study of the Bible may join us as a member. However, only persons who honestly sign the Statement of Faith attached hereto as Exhibit "A" are entitled to vote. A quorum for voting purposes shall consist of not less than four students eligible to vote. If school policy requires a sponsor for each noncurricular organization, then the club sponsor shall not be entitled to vote and the appointment of said sponsor shall not be construed as a school endorsement of the club. The officers of the organization shall be as follows:

1. President, Vice President, Secretary and Treasurer.
2. President and Secretary will be combined offices.
3. Vice President and Treasurer will be combined offices.

4. Any student holding office must honestly sigh the Statement of Faith and believe in and be committed to biblical principles.

The character, behavior, speech and conduct of every person participating in the club reflects upon the religious expression and association of the club. Therefore, the privilege of membership is contingent upon the member complying in good faith and Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible.

Biblical standards for leaders of churches and studies are outlined in I Timothy 3:2-7

Article IV
Meetings and Election of Officers

Meetings shall be conducted weekly consistent with school policy for other noncurricular organizations and not inconsistent with state or federal law. There shall be at least on annual meeting for the purpose of electing officers to be held in September of each year unless otherwise agreed upon by a vote of the membership. One week before the annual meeting, nominations may be made by the membership for officers to be placed on the slate of membership the following week. Nomination of officers may also be made from the floor at the time of the annual meeting. All votes must be cast by secret ballot and the candidates receiving the most votes of those members eligible to vote shall be installed as officers which term shall take effect immediately. Any vacancy in any office occurring before the next

annual meeting shall be filled within two weeks pursuant to the same procedures outlined herein.

Article V
Duties and Responsibilities

The duties and responsibilities of the officers shall be as follows:

Section 1 – President

The president or the president's designee shall preside at all meetings and shall insure that all meetings are conducted properly. The president shall have the responsibility for the spiritual leadership and guidance of the club. The president shall be primarily responsible for the leading of the club in Bible study and prayer.

Section II – Vice President

The vice president shall assist the president. If at any time the president is unable to perform the duties of president by reason of illness, incompetence, absence, or resignation, the vice president shall temporarily act as president until such time as an election occurs to fill the vacancy of president. Therefore, the vice president shall be secondarily responsible for the spiritual leadership, guidance, Bible study and prayer of the club.

Section III – Secretary

The secretary shall be responsible for posting any time or place of any meeting. The secretary or the

secretary's designee shall also be responsible for counting ballots during the annual election. The secretary shall also be responsible for keeping any records of minutes.

Section IV – Treasurer

The treasurer shall be responsible for any monies under the direction, control or possession of the club.

Article VI
Adoption

This constitution shall be adopted by two-thirds majority vote of those members eligible to vote.

Article VII
Amendments

This constitution may be amended at any regular or annual meeting provided that the specific amendment is read or posted two consecutive weeks prior to the vote on the amendment. The amendment must be adopted by two-thirds majority vote of the membership entitled to vote. Any amendment shall take effect immediately unless a motion otherwise specifies a time certain.

_____ _____

Secretary President

Kentridge High School
Club Charter Application

Kentridge clubs provide academic, social, and athletic opportunities and experiences. All Kentridge clubs must be chartered prior to any fund raising activities. The following steps will be involved in the chartering process.

1. All prospective clubs must complete a Kentridge Club Charter Application. The application may be obtained in the Activities Office.

2. The completed application should be turned in to the Activities Coordinator.

3. The application is reviewed by the ASB and Activities Coordinator. A recommendation is then presented to the Principal.

4. The membership list is reviewed to verify that all members have purchased an ASB card.

5. The applicant is notified of the approval or denial of the request.

6. All chartered clubs and activities (sports) must perform a school/community service.

All clubs are expected to follow district/school policies; clubs failing to adhere to these standards may have their charter revoked.

CLUB NAME: Earth Corps (YMCA) DATE: 3-30-90

PURPOSE: To promote public awareness and interest for environmental issues influencing our community

AMOUNT OF MONEY YOU NEED TO FUNCTION THIS YEAR: $ 0

HOW DO YOU INTEND TO RAISE THIS MONEY? (BE SPECIFIC)

1. Specific Fundraisers feeding back to Earthcorps

2. _____

FUNCTIONS YOU INTEND TO PERFORM FOR THE SCHOOL: Provide environmental awareness

SCHOOL/COMMUNITY SERVICE: To create environmental improvements through activities such as recycling, tree planting, clean up involvement etc.

MEMBERSHIP CRITERIA: Interest and dedication toward environmental issues.

ADVISORS' SIGNATURE: (signature)

CLUB OFFICERS

~~PRESIDENT~~: Melissa Haney

~~VICE PRESIDENT~~: Valisa Smith

~~SECRETARY~~: Heather Fowller

~~TREASURER~~: Nicole Meinzer

OTHER OFFICERS: _____

A CURRENT MEMBERSHIP LIST MUST BE ATTACHED TO THE APPLICATION.

****

APPROVED X DENIED ____ DATE: 4-12-90

ASB PRESIDENT: (signature) _____

ACTIVITIES COORDINATOR: (signature) _____

Kentridge High School
Club Charter Application

Kentridge clubs provide academic, social, and athletic opportunities and experiences. All Kentridge clubs must be chartered prior to any fund raising activities. The following steps will be involved in the chartering process.

1. All prospective clubs must complete a Kentridge Club Charter Application. The application may be obtained in the Activities Office.

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3. The application is reviewed by the ASB and Activities Coordinator. A recommendation is then presented to the Principal.

4. The membership list is reviewed to verify that all members have purchased an ASB card.

5. The applicant is notified of the approval or denial of the request.

6. All chartered clubs and activities (sports) must perform a school/community service.

All clubs are expected to follow district/school policies; clubs failing to adhere to these standards may have their charter revoked.

CLUB NAME: Gay-Straight Alliance DATE: 10-1-99

PURPOSE: see attached

AMOUNT OF MONEY YOU NEED TO FUNCTION THIS YEAR: $ 0

HOW DO YOU INTEND TO RAISE THIS MONEY? (BE SPECIFIC)

1. n/a

2.

FUNCTIONS YOU INTEND TO PERFORM FOR THE SCHOOL: see attached

SCHOOL/COMMUNITY SERVICE: To educate people throughout the school and community about GLBTQ* people in the hopes of providing a greater understanding and acceptance of this group.

MEMBERSHIP CRITERIA: Students at Kentridge High School, must be willing to work towards the goals of the club.

ADVISORS' SIGNATURE: (signature)
(signature)

CLUB OFFICERS

PRESIDENT: Lindy Webster

VICE-PRESIDENT: Barb Hamilla

SECRETARY: _____

TREASURER: _____

OTHER OFFICERS: _____

A CURRENT MEMBERSHIP LIST MUST BE ATTACHED TO THE APPLICATION.

****

APPROVED ✓ DENIED ____ DATE: _____

ASB PRESIDENT: (signature) _____

ACTIVITIES COORDINATOR: (signature) _____

ADMINISTRATOR: (signature) _____

*Gay, lesbian, bisexual, transgendered, and questioning

PURPOSE: The purpose of this club will be to bring GLBTQ* issues into the open, while working to decrease homophobia. We will work towards changing stereotypes and prejudices formed against the gay community and create a safe talking environment for people who what to discuss GLBTQ* issues. We will work to fight heterosexism

and other forms of oppression while trying to educate others about GLBTQ* people.

FUNCTIONS YOU INTEND TO PERFORM FOR THE SCHOOL: To educate others about GLBTQ* people. To work towards changing prejudices and stereotypes formed against this group of people. To provide a safe environment to discuss GLBTQ* issues.

*Gay, lesbian, bisexual, transgendered, and questioning

CONSTITUTION FOR KENTRIDGE GAY-STRAIGHT ALLIANCE

ARTICLE I: NAME AND PURPOSE

Section I:
The name of this organization is the Gay-Straight Alliance

Section II:
The purposes of this organization are as follows:

I: Promote tolerance and acceptance of diversity in sexual orientation

II: Create a safe environment for all students

III: Create a school environment where all can feel welcomed and accepted for there *(sic)* unique talents and contributions.

IV: Enjoy the full benefits of the public education system free from fear of harassment or persecution

ARTICLE II: MEMBERSHIP

Section I:
Any student or faculty member of Kentridge High School is eligible for membership and may join the club if they meet the qualifications listed in Section 2.

Section II:
The qualifications for membership are as follows:

I. Any student or faculty member interested may attain membership By participating in club meetings.

ARTICLE IV: OFFICERS

Section I:
The election of officers should be carried out as follows:

A meeting held towards the end of the previous school year to determine who will serve as officers in the year to come. During this meeting, those present will have several items of business to fulfill. These will include the following:

I. Identifying various positions, to be filled by one person each, who fulfillment will serve as a boon to the organization's purposes and goals.
II. The nomination of particular individuals to serve in the position, a vote will be held among those present to determine who of the nominated shall hold it. Each candidate shall be allowed a short speech

in which he or she may outline his or her qualifications to serve his or her goals if he or she were to be elected. After these speeches, the vote will be held, and the majority will preside over the results. The vote shall be held as in deemed necessary by those present.

III. After the election, officers are immediately instated in their positions and are obligated to fulfill their duties, described in Section II, for the upcoming school year.

Section II:
The duties and power of an officer are as follows:

I. The officers must fulfill the obligations mandated by that officers elected role.
II. The officer must attend a majority of the meetings held throughout the school year.
III. The officer has the power, at any time, to step down from his or her position. To do so, the officer must notify the advisor and other members of the club. In the event of such a resignation, a new officer will be elected following the guidelines for election give in Section I above.

Section III:
If necessary, the impeachment of officers will proceed as follows:

If any member of the club feels that an elected officers fails to meet the responsibilities listed above, the member may call at a meeting for the impeachment of that officer. If a significant portion

of the club then agrees that the elected officer has failed in his or her duties, the impeachment will take place.

The accused officer, if impeached, may defend themselves in the interest of remaining as an officer. In this defense is not adequate to sway the opinion of the club, the officer will be removed from office, and an election, as described in Section I, will be held to determine a replacement. An impeached officer may remain as a member of the club.

ARTICLE V: MEETINGS AND ATTENDANCE

Meetings will be held as the club decides that should be held. Anyone is welcome to attend any meeting, so long as they respect and obey the rules and regulations of the club. Again, officers must attend a majority of the meetings. There are not attendance requirements for regular members.

ARTICLE VI: RULES AND REGULATIONS

The rules and regulations of the club are as follows:

I. Be knowledgeable about regulations, which govern club activities at Kentridge High School.

II. Follow all rules, regulations, and procedures as outlined by the activities office and/ or Kentridge High School.

ARTICLE VII: AMENDMENTS

Section I:
The instating of amendments: amendments to the constitution may be suggested by the advisor or any other member of the club and will be instated by a majority vote.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
MAY 29 2009
OFFICE OF THE CLERK

No. 08-1130

In the Supreme Court of the United States

TRUTH, *et al.*,

Petitioners,

v.

KENT SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, which provides that a public secondary school maintaining a "limited open forum" may not "deny equal access or a fair opportunity to, or discriminate against" a proposed student group meeting "on the basis of the * * * content of the speech" at the proposed meeting, precludes a school from applying its non-discrimination policy to withhold official recognition from a student group that excludes students from non-voting membership on the basis of a religious test.

2. Whether a viewpoint-neutral restriction on granting official recognition to a student group in the high school setting must in all cases be reviewed under a strict scrutiny standard.

RULE 29.6 STATEMENT

The Kent School District is a government entity with neither a parent company nor any non-wholly-owned subsidiaries. The other respondents are natural persons.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 524 F.3d 957. The court of appeals' order denying petitioners' petition for rehearing en banc (Pet. App. 148a-164a) is reported at 551 F.3d 850. The district court's opinion and order granting summary judgment for respondents (Pet. App. 111a-147a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2008, and a petition for rehearing was denied on November 17, 2008. On February 4, 2009, Justice Kennedy issued an order extending the time for filing a certiorari petition to and including March 10, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The text of the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, appears at Pet. App. 165a-170a.

STATEMENT

A. Background

1. Two types of non-curriculum student groups are permitted at schools within the Kent School District, which is located in Washington State. Groups chartered by a school's Associated Student Body Council ("ASB")—a group of students designated to act as representatives of the student body—are entitled to receive school funds, may use the school district finance department for purchases, receive a faculty advisor who must be present at meetings and

assist in the club's activities, meet during non-instructional time, and may be recognized in the yearbook and announce activities over the school public address system. Pet. App. 9a-10a, 112a.

Groups not chartered by the ASB may be recognized by the school principal. They are permitted to meet on school property before or after instructional hours, but they do not receive all of the privileges accorded to ASB-recognized clubs. Pet. App. 9a.

The School District has a policy requiring "equal educational opportunity and treatment for all students in all aspects of the academic and activities program," which specifies that "[e]qual opportunity and treatment is provided without regard to race, creed, color, national origin, sex, marital status" and other characteristics. Pet. App. 9a. It is undisputed that "inclusion of 'creed' indicates that discrimination based on religion is prohibited." *Ibid.*[1]

2. The individual petitioners, who at the time were students at Kentridge High School, applied for an ASB charter for a club named "Truth." Pet. App. 113a. The revised charter application submitted in April 2003—which all parties agree is the relevant application for purposes of this litigation (*id.* at 13a)—states that the club's purpose is "[t]o study the Bible and the Gospel of Christ and to associate with other believers in Christian fellowship." *Id.* at 174a.

The charter application "divides the membership into three categories: voting members, non-voting members, and attendees." Pet. App. 7a. Although

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[1] The State of Washington also has adopted a statute prohibiting discrimination on the basis of religion. See Washington Revised Code § 49.60.215 (West 2006); Pet. App. 10a-11a.

"[m]eetings are open to everyone" (*ibid.*), the "privilege of membership" is "contingent upon the member complying in good faith with Christian character, Christian speech, Christian behavior and Christian conduct as generally described in the Bible." *Ibid.* The proposed membership criteria include "a true desire to * * * grow in a relationship with Jesus Christ." *Id.* at 174a.

To qualify as a voting member, a student in addition would be required to sign a "statement of faith" requiring the student to affirm that he or she believes "the Bible to be the inspired, the only infallible, authoritative Word of God," that he or she believed that "salvation is an underserved gift from God," and that only by "acceptance of Jesus Christ as my personal Savior, through His death on the cross for my sins, is my faith made real." Pet. App. 7a-8a.[2]

The ASB Council denied the application for a charter by a unanimous vote, with one member abstaining. Pet. App. 8a. The district court explained that, among other things, "[t]he ASB members were opposed to the club's faith-based membership requirement and the oath requirement for voting member status." *Id.* at 117a.[3]

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[2] The proposed charter also specified that officers were obligated to sign the Statement of Faith and to "believe in and be committed to biblical principles." Pet. App. 178a.

[3] The record indicates that there are two religious clubs in the Kent School District that are ASB approved. Pet. App. 29a n.2. A "Bible Club" at a junior high school has been in existence for ten years, and a "Truth Seekers" Bible club at a high school has been in existence for three years. Pet. App. 124a. Membership is open to all students in both clubs. *Ibid.*

B. Proceedings Below

Petitioners filed a complaint in the United States District Court for the Western District of Washington, alleging that the District had violated the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, which prohibits a public secondary school that "has a limited open forum" from "deny[ing] equal access or a fair opportunity to, or discriminat[ing] against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious * * * content of the speech at such meetings." The complaint also alleged violations of their First Amendment rights of free speech and expressive association; the Free Exercise Clause; the Establishment Clause; and the Equal Protection Clause.[4]

1. *The District Court's Decision.* The district court granted summary judgment in favor of respondents. Pet. App. 111a-147a.

The court based its decision exclusively on the proposed requirements for non-voting membership. Pet. App. 132a & n.10. It expressly did not address whether the School District could deny the application based solely on the restrictions on voting membership or officer status.

With respect to the statutory claim, the court concluded that the proposed membership policy was not "protected speech under the EAA"; accordingly,

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In addition, Kentridge High School has two non-ASB chartered clubs with a religious focus: the "Young Life" club (a Christian group), and the "Prayer Around the Flagpole" group. Pet. App. 6a.

[4] Petitioners instituted this action before the denial of the application for a charter, but subsequently sought relief from that decision. Pet. App. 116a-118a.

"denying the Club ASB status because of its exclusionary general membership policy does not constitute a denial of equal access or discrimination based on the content of the Club's speech. As such, the School has not violated the EAA." *Id.* at 132a.

The district court also rejected Truth's First Amendment association claims, holding that the School District's nondiscrimination policy furthers its compelling interest in "provid[ing] equal opportunity and treatment to all students to participate in school activities programs without regard to religion, race, or sex (among other things)." Pet. App. 138a. It rejected petitioners' argument that inclusion of students of other faiths as non-voting members would interfere materially with the Club's expression of its ideas:

> The general members do not control the Club's Bible study and prayer functions. They do not lead the Club in its spiritual activities, nor do they dictate or control the other members' religious beliefs

Id. at 143a. Even if the Club included those of other faiths as non-voting members, "the Club could still expound upon its particular beliefs, including for example the idea that only certain beliefs, conduct, and speech are truly Christian." *Ibid.*

The district court did not rule on the remaining claims (based on the Equal Protection Clause, Establishment Clause, and Free Exercise Clause), finding them to be "subsumed within" the First Amendment argument. Pet. App. 147a.[5]

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[5] The district court also granted summary judgment for the School District on the ground that petitioners failed to establish

2. *The Court of Appeals' Decision*. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-38a. Like the district court, the court of appeals based its decision solely on the proposed charter's requirements for non-voting membership. *Id.* at 20a & 23a n.1.

The court held that a party asserting a claim under the EAA must demonstrate—in addition to the existence of a limited open forum—"1) a denial of equal access, or fair opportunity, or discrimination; 2) that is based on the 'content of the speech' at its meetings." Pet. App. 22a. It pointed out that "content of the speech" has "a particular meaning in First Amendment jurisprudence" (*id.* at 23a), holding that the Act's prohibition is triggered "to the extent the limitation [on a club] is justified with reference to the expressive content of the regulated conduct." *Id.* at 24a.

Here, the court held, "[o]n their face, the District's non-discrimination policies do not preclude or discriminate against religious speech" (Pet. App. 26a) and the District did not "justif[y] its non-discrimination policies with reference to the content of a message Truth's discriminatory conduct may attempt to convey. The policies are content neutral." *Id.* at 27a. Accordingly, the District's policies "do not implicate any rights that Truth might enjoy under the Act." *Ibid.*

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a basis for liability under *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), and its progeny. Pet. App. 121a-130a. The court of appeals reversed that determination. Pet. App. 19a-20a. Respondents have filed a conditional cross-petition (No. 08-1268) with respect to that ruling.

The court observed, however, that petitioners also contended "that the District violated the Act by allowing certain groups an *exemption* from the non-discrimination policy" but allegedly refused to grant such exemptions to religious groups. Pet. App. 28a. "If indeed the District has a policy of enforcing the non-discrimination policy only against religious groups," the court stated, "this policy would of course violate the Act." *Ibid.* The court reversed and remanded "for further proceedings on this limited issue." *Id.* at 29a (footnote omitted).

The court reached a similar conclusion with respect to the First Amendment association claim. It observed at the outset that "the members of Truth are not seeking merely to associate as a group; they are seeking to associate as a *school-sponsored* group" with special rights to funds, school property, and facilities. "Therefore, we must evaluate the District's denial of ASB recognition as a restriction on a 'limited public forum.'" Pet. App. 30a (citation omitted). The applicable standard, therefore, was "whether the District's policy of restricting access to the ASB forum based on compliance with its non-discrimination policy is viewpoint neutral and reasonable in light of the purposes of the forum." *Id.* at 31a.

Because "the purpose of the ASB program is to advance the school's basic pedagogical goals," and "instilling the value of non-discrimination" is a legitimate part of a school's mission, the District's decision to restrict ASB charters "based on a group's willingness to adhere to the school's non-discrimination policy is reasonable in light of the purposes of the forum." Pet. App. 32a.

The court also determined that the policy is viewpoint neutral, because "the school is not denying

Truth [a charter] based solely on its religious viewpoint, but rather on its refusal to comply with the District's nondiscrimination policy." Pet. App. 33a. "[T]he District no more engaged in viewpoint discrimination by excluding Truth for refusing to comply with is non-discrimination policy than it would have engaged in viewpoint discrimination by refusing to grant ASB status to a Student Pro-Drug Club that refused to obey the school's anti drug policy." *Ibid.*

As with the statutory claim, the court pointed out that "[t]here is evidence in the record that other groups * * * were granted ASB recognition despite violating the District's non-discrimination policy." Pet. App. 33a. It reversed and remanded with respect to petitioners' claim that they were "denied an *exemption* from the non-discrimination policy based on the content of [their] speech." *Ibid.* (emphasis in original). It also reversed and remanded with respect to petitioners' Free Exercise Clause, Establishment Clause, and Equal Protection Clause arguments resting on the same contention. *Id.* at 34a.

Judges Fisher and Wardlaw joined a concurring opinion, further explaining why any burden on petitioners' right of expressive association resulting from application of the non-discrimination policy was properly assessed under the standard governing access to a limited public forum. Pet. App. 35a-38a.

The Ninth Circuit denied rehearing en banc with two judges dissenting. Pet. App. 148a.[6]

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[6] The district court on remand denied the parties' joint motion to stay proceedings pending this Court's disposition of the cer-

REASONS FOR DENYING THE WRIT

The unanimous decision below is correct and does not conflict with any decision of another court of appeals or with a decision of this Court. Moreover, the decision is interlocutory: The court of appeals reversed and remanded parts of the district court's ruling on both the statutory and constitutional claims. Petitioners accordingly may receive full relief in the district court or on an appeal of the remanded issues. If they do not, this Court would have the opportunity to review the court of appeals' rulings here as well as its rulings with respect to the closely-related remanded issues. Review at this time plainly is not warranted.

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS REGARDING THE QUESTIONS PRESENTED.

Petitioners' claims of conflicts among the courts of appeals are simply wrong. The decisions petitioners cite accord fully with the ruling in this case.

A. Equal Access Act

Petitioners assert (Pet. 11) that the statutory holding below conflicts with *Hsu* v. *Roslyn Union Free School District*, 85 F.3d 839 (2d Cir. 1996). As both courts below explained, however, the opinion in *Hsu* leaves no doubt that the Second Circuit would reach the same conclusion with respect to the issue presented here.

The question in *Hsu* was whether the EAA was implicated by a school's determination that a reli-

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tiorari petition. (The statement in the certiorari petition that the district court issued a stay (Pet. 13 n.5) is in error.)

gious club could not apply a religious test for *leadership positions*. Because the content of speech at a club's meeting would be affected by the beliefs of those holding such positions—who set the agenda for meetings—the Second Circuit concluded that the Act prohibits a school from requiring non-discrimination with respect to leadership positions. 85 F.3d at 857-858.

Indeed, the Second Circuit expressly distinguished the issue in this case, stating that a "religious test" for general membership in a student group would be "plainly insupportable" because "[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech." *Hsu*, 85 F.3d at 858 & n.17.

The court below distinguished *Hsu* on precisely this basis. Pet. App. 27a-28a; see also *id.* at 134a (same reasoning by district court). There accordingly is no conflict regarding the statutory issue.

B. The First Amendment

Petitioners contend (Pet. 29-31) that the court of appeals' First Amendment ruling conflicts with *Christian Legal Society* v. *Walker*, 453 F.3d 853 (7th Cir. 2006). That case is plainly distinguishable. Indeed, as with *Hsu*, the Seventh Circuit's holding in *Walker* indicates that it would reach the same result as the court below on the facts presented here.

Walker involved a decision by Southern Illinois University to revoke the official status of the law school's Christian Legal Society chapter after the group refused to allow "active homosexuals" to become voting members or to assume leadership positions. The University concluded that this member-

ship limitation violated its policy prohibiting discrimination on the basis of sexual orientation. 453 F.3d at 858.

Reviewing the district court's denial of a preliminary injunction, the court of appeals concluded that the plaintiffs had a reasonable likelihood of prevailing on their First Amendment expressive association and free speech claims for several reasons. First, the court found a likelihood of success on the claim that the CLS had not in fact violated any university policy. 436 F.3d at 860-861. That determination alone distinguishes the *Walker* holding—petitioners do not contend that the School District's nondiscrimination policy was inapplicable here.

Second, the *Walker* court went on to conclude that application of the nondiscrimination policy "would significantly affect CLS's ability to express its disapproval of homosexual activity" because forcing it to change its standards for "voting members and officers" would inevitably "impair its ability to express disapproval of active homosexuality." 453 F.3d at 862, 863.

That conclusion—as both the court below and the *Hsu* court explained—has no application to membership standards for *non*-voting members. A voting member, by virtue of her ability to vote for the leaders of her choice, can have a significant impact on the agenda of the group. But a non-voting member could not have that impact; indeed, the Seventh Circuit distinguished the impact of the university's action by pointing to the very different situation of requiring that meetings be open to individuals who do not satisfy the membership criteria. 453 F.3d at 863.

Because the present case involves only non-voting members, the Seventh Circuit's conclusion is wholly inapposite. And the court's reasoning seems to indicate that it would reach the same conclusion as the court below on the facts presented here.[7]

The third basis for the *Walker* court's finding of a reasonable probability of success on the merits involved the plaintiff's free speech claim. The court found it unnecessary to determine the nature of the forum—public, limited, or nonpublic—because of the "strong evidence that the [university] policy has not been applied in a viewpoint neutral way." 453 F.3d at 866. The court concluded that "SIU has applied its antidiscrimination policy to CLS alone, even though other student groups discriminate in their membership requirements on grounds that are prohibited by the policy"; the plaintiff therefore "demonstrated a likelihood of success on its claim that SIU is applying its policy in a viewpoint discriminatory fashion." *Id.* at 866-67.

The court below similarly recognized that discriminatory application of a policy could give rise to a

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[7] Petitioners contend (Pet. 12-13, 29) that *Walker* holds that expressive association claims always trigger strict scrutiny analysis, and that the failure of the court of appeals to apply that standard here establishes a conflict with *Walker*. But *Walker* applied strict scrutiny because the court determined that the application of the university's policy "significantly affect[ed] CLS's ability to express its disapproval of homosexual activity" (436 F.3d at 862), and that finding rested on the result of invalidating membership criteria for "voting members and officers" (*ibid.*). Here, where the court's decision related only to the application of a nondiscrimination policy to non-voting members, the predicate for application of strict scrutiny is not present.

First Amendment violation, and it reversed the district court's grant of summary judgment with respect to petitioners' discrimination claim and remanded for further proceedings. Here too, the court below's decision is wholly consistent with *Walker*, because nothing in *Walker*'s free speech analysis cast doubt on the conclusion of the court of appeals here that even-handed application of the nondiscrimination policy with respect to non-voting members does not implicate the First Amendment.

There is yet another reason why *Walker* does not conflict with the decision below: the important differences between the high school and university setting. In particular, this Court has traditionally recognized that school districts have greater latitude in regulating student speech in primary and secondary schools than colleges and universities whose students are older. See, *e.g.*, *Healy* v. *James*, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is particularly 'the marketplace of ideas.'"); *Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981) (noting that university students are "young adults," who are "less impressionable than younger students"); see generally *Tinker* v. *Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (First Amendment is "applied in light of the special characteristics of the school environment").

There is no reason to assume that the First Amendment would apply identically to the high school and university settings with respect to these issues.[8] That is yet another reason why there is no conflict between *Walker* and the decision below.

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[8] For example, a high school is not required to tolerate speech that would undermine its "basic educational mission." *Bethel*

Finally, petitioners argue (Pet. 31-32) that the reasoning of the court of appeals here conflicts with *Cuffley* v. *Mickes*, 208 F.3d 702 (8th Cir. 2000), because the Eighth Circuit did not apply forum analysis to the expressive association claim in that case. The decision in *Cuffley* is identical to the analysis of the free speech claim in *Walker*—the court did not have to consider the nature of the forum because it found that the defendant *had* engaged in viewpoint discrimination.

The question in *Cuffley* was whether the exclusion of the Ku Klux Klan from the Adopt-A-Highway program violated the Klan's First Amendment rights. The court found the State's assertion that it based its decision on the Klan's discriminatory membership policy "so obviously unreasonable and pretextual" that it could only conclude that in denying the Klan's application to participate in the Adopt-A-Highway program the State engaged in "viewpoint-based discrimination." *Id.* at 711-712 (noting that the State admitted, with remarkable candor, that it had paid special attention to the Klan's application because of the Klan's beliefs and advocacy). See *id.* at 706 n.3 (explaining why court did not need to decide whether program was a public forum). Like the Seventh Circuit in *Walker*, the court simply had no need to inquire into the type of forum created by the Adopt-A-

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Sch. Dist. v. *Fraser*, 478 U.S. 675, 685 (1986). The basic educational mission of a public high school involves teaching the "'habits and manners' of civility essential to a democratic society," including "tolerance of divergent political and religious views." *Id.* at 681. In virtue of the relative youth and inexperience of their students, secondary schools have a greater interest in taking steps to teach students to be tolerant than law schools.

Highway program in order to find a constitutional violation.

Far from establishing a conflict, therefore, the decisions cited by petitioners confirm the absence of a conflict regarding the questions presented on the facts of this case.

II. PETITIONERS HAVE AN OPPORTUNITY TO PREVAIL ON THEIR STATUTORY AND CONSTITUTIONAL CLAIMS ON REMAND.

The decision below is interlocutory: the court of appeals reversed the grant of summary judgment with respect to a portion of petitioners' statutory and constitutional claims. Petitioners may receive full redress in the proceedings on remand. If they do not, they may again seek review by this Court of any adverse decision with respect to the remanded claims, and this Court then would be able to assess all of petitioners' claims at once with the added benefit of a fully developed record. That is a compelling additional reason why certiorari should be denied now.

The court of appeals reversed the district court's summary judgment and remanded for further proceedings on the "limited issue" of whether the School District discriminated on the basis of religion or on the basis of the content of petitioners' speech in refusing to grant an exemption from the District's nondiscrimination policy. Pet. App. 29a, 33a, 34a; see also *supra* at 7, 8.

Proceedings in the district court are ongoing (the district court denied the parties' motion for a stay pending this Court's disposition of the certiorari petition) and the parties are actively preparing for trial. If petitioners prevail on remand—showing that "the

District has a policy of enforcing the nondiscrimination policy only against religious groups," which "would of course violate the [Equal Access] Act" (Pet. App. 28a) and the Constitution (*id.* at 34a)—they would be entitled to obtain relief.

If petitioners are not successful on remand, they may obtain review in the court of appeals and, if that too is unsuccessful, seek certiorari and raise their claims relating to both the present determination by the court of appeals as well as the final judgment entered once the allegation of pretext has been resolved. And at that time the Court would have the benefit of the additional factual development on remand, which could well provide important illumination of the issues raised by petitioners.

For these reasons, the Court should deny review now and allow the parties to finish the ongoing remand proceedings.[9]

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[9] Some of petitioners' amici point to the recently-filed certiorari petition seeking review of *Christian Legal Society* v. *Kane*, No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009), cert. pending, No. 08-1371. But the certiorari petition states that *Kane* involves the application of a nondiscrimination policy to an organization's criteria for *voting* members and leadership positions. *E.g.*, No. 08-1371 Pet. 9 (explaining impact of policy on "criteria for choosing officers and voting members"). The constitutional claims in that case therefore present issues different from those raised in this case, for the reasons explained in the text.

III. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' CHALLENGES TO THE APPLICATION OF THE NON-DISCRIMINATION POLICY.

By ruling consistently with the other courts of appeals, the Ninth Circuit reached the correct result with respect to both the EAA and First Amendment issues presented. The EAA does not protect free-standing associational claims that are not related to protected speech at school-group meetings, and petitioners cannot make the requisite connection. In the same vein, the Ninth Circuit was correct to apply this Court's forum jurisprudence to petitioners' free association claims, and came to the correct conclusion. The consistency between the analysis below and that in the court of appeals decisions cited by petitioners—and the fact that only two judges of the court of appeals' 27 active judges dissented from denial of rehearing en banc—demonstrates that the lower courts need no further guidance on the issues presented.

A. The Equal Access Act

The Ninth Circuit properly began its analysis with the text of the EAA, which makes it "unlawful for any public secondary school * * * [to] discriminate * * * on the basis of the * * * *content of the speech* at such meetings." 20 U.S.C. § 4071(a) (emphasis added). It is elementary that where the language of a statute is clear and unambiguous, courts "must apply the statute according to its terms." *Carcieri* v. *Salazar*, 129 S.Ct. 1058, 1063-1064 (2009); *Massachusetts* v. *EPA*, 549 U.S. 497, 527-534 (2007). The language at issue is absolutely clear: discrimination is prohibited, and only prohibited, with regard to the "content of the speech at [covered] meetings." The word "asso-

ciate" and its cognates are nowhere to be found in the EAA.

Citing to a fragment of legislative history, petitioners argue that the EAA nonetheless impliedly protects associational rights as such. Pet. 16-18. As the court below, and Second Circuit in *Hsu*, held, however, the statutory text protects *speech*, and protects association only insofar as free association is necessary for a group to control its speech. See *Hsu*, 85 F.3d at 859. Hence the Ninth Circuit correctly focused its analysis, first, on whether there was any evidence indicating that the District's denial of ASB status was based on animus towards the group's religious speech, and, second, on whether the general membership limitation was necessary for petitioners to control the content of speech at meetings.

1. The Ninth Circuit correctly concluded that respondents' action did not constitute action that "den[ies] equal access or a fair opportunity to, or discriminate[s] against" Truth on the basis of the content of speech at its meetings. 20 U.S.C. § 4071(a). "Equal access" means offering access to school facilities "on the terms available to other groups." *Widmar*, 454 U.S. at 270-71. Requiring that all student groups seeking ASB status must first comply with district policies and state law prohibiting discriminatory practices offers the same terms to all and does not differentiate based on the "nature of their speech," but rather regulates discriminatory *acts*. See *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (holding that conditioning access to government benefits on compliance with a non-discrimination policy regulates acts, not speech). Hence denial of ASB status

did not discriminate against petitioners on the basis of the content of their speech.

Petitioners claim that allowing schools to differentiate between student groups based on groups' discriminatory membership criteria would render the EAA's protection of speech a "hollow guarantee." Pet. 14. However, this Court's precedents prove that robust protection of speech need not inhibit appropriate government policies that regulate certain categories of acts. The fact that a policy prohibiting certain pernicious acts has a differential effect on groups holding particular viewpoints does not render that policy facially viewpoint discriminatory; whether the policy is viewpoint discriminatory depends on the government's intention with respect to the speaker's message. See, *e.g.*, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 385 (1992) ("[N]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not."); *Madsen* v. *Women's Health Center*, 512 U.S. 753, 762-63 (1994) (holding that an injunction against anti-abortion protesters was not viewpoint discriminatory because "none of the restrictions imposed by the court were directed at the contents of petitioner's message").

Petitioners failed to provide any evidence establishing that the non-discrimination policies were created "with reference to the content of a message Truth's discriminatory conduct may attempt to convey." Pet. App. 27a. Without that evidence, there is no foundation to petitioners' claim that the non-

discrimination policies are facially viewpoint discriminatory.

2. To the extent that the EAA protects expressive association, it does so only to safeguard "the content of the speech at [school group] meetings." 20 U.S.C. § 4071(a). But, as the Second Circuit pointed out in *Hsu*, it is "difficult to understand" how permitting non-Christians to be low-level, general members would undermine a religious student group's control over the speech at its meetings. 85 F.3d at 858 n.17. Because any implicit protection of expressive association under the Act is aimed at protecting student groups' right to speak, the District's requirement that general members be admitted on a non-discriminatory basis does not pose a threat to Truth's expressive activities as protected by the EAA.

Petitioners have no persuasive response on this score, arguing only that "[a]llowing those who lack desire to have a relationship with Jesus Christ" to be general, non-voting members "would significantly undercut the core message Truth is seeking to convey inside and outside of its group." Pet. 24. Insofar as the EAA seeks to protect only "speech" at "meetings," not inchoate messages conveyed "outside of [a] group" by excluding students from non-voting membership, Truth's alleged associational communication is not within the EAA's sweep.

3. The Ninth Circuit's analysis is consonant with this Court's analysis of expressive association rights in the constitutional context. Although the Court in *Boy Scouts of America* v. *Dale*, indicated that deference should be given "to an association's view of what would impair its expression," it went on to note: "That is not to say that expressive association can erect a shield against antidiscrimination laws simply

by asserting that mere acceptance of a member from a particular group would impair its message." 530 U.S. 640, 653 (2000). In *Dale,* the Court weighed how different membership levels would affect the Scout's expressive activity to varying degrees, and deferred to the Scouts' reasonable conclusion that being forced to accept a "gay rights activist" as a troop leader would necessarily impair the Scouts' anti-homosexual message to a degree that First Amendment protections applied.

Here, Truth has provided no reasonable explanation of how the exclusionary criterion for non-voting membership advances its speech, beyond the conclusory assertion just quoted. *Dale* permits—indeed, requires—that courts look behind such allegations to ascertain whether they have a reasonable basis to which deference is appropriate. No such basis has been offered; and petitioners' conclusory claim is undercut significantly by their willingness to open meetings to all attendees. Thus, contrary to petitioners' claims, the *Hsu* and *Truth* courts' use of similar calculus (and their distinction regarding leaders) in the EAA cases is in keeping with this Court's expressive association jurisprudence.

B. The First Amendment

Petitioners argue that the Ninth Circuit's use of forum analysis to determine a student group's First Amendment rights is inappropriate when associational rights are at stake, and that the decision below is thus in conflict with *Boy Scouts of America* v. *Dale* and *Healy* v. *James*, 408 U.S. 169 (1973). Pet. 14. This contention relies on an overly broad reading of *Dale* and its antecedent cases, and on a failure to recognize *Healy*'s place in the historical development of forum doctrine. The Ninth Circuit's use of forum

analysis to determine the level of protection afforded to speech in a limited public forum (and thus, to expressive association in such a forum) correctly applies this Court's First Amendment precedents.

1. Petitioners note that this Court has not itself applied forum analysis in its expressive-association cases. Hence *Dale*, *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984), and *Bd. of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987), involved discriminatory membership conditions, but were decided using an expressive association analysis that did not involve forum analysis. See Pet. 24-26.

But the absence of forum analysis in these decisions is entirely to be expected, since *no government fora were at stake*. *Dale*, *Roberts*, and *Rotary Club* each involved groups whose broad right to operate with discriminatory membership criteria was contested under state public accommodations laws.[10] These cases thus provide no guidance as to the proper analytical frame for viewing a case that involves discriminatory membership criteria *and* a lim-

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[10] Petitioners' citation of *Democratic Party* v. *Wisconsin*, 450 U.S. 107 (1981), is inapposite. That case involved a state open primary law's attempt to require a national political party, not to take members that did not subscribe to its principles, but to conform its conduct to the votes of those nonmembers. *Id.* at 120 ("The question in this case is not whether * * * the National Party may require Wisconsin to limit its primary election to publicly declared Democrats. Rather, the question is whether * * * [Wisconsin] may then bind the National Party to honor the binding primary results * * *."). Moreover, this Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party select[s] a standard bearer." *California Democratic Party* v. *Jones*, 530 U.S. 567, 575 (2000) (quotation marks and citation omitted).

ited public or nonpublic government forum. There is therefore no tension between the private membership cases and the Ninth Circuit's decision here.

2. Petitioners cite *Healy*, a case in which a college attempted to prevent development of a Students for a Democratic Society chapter, for the proposition that expressive association is the only doctrinal lens through which to view school group exclusion cases. Petitioners suggest that forum analysis is inappropriate here because it was not employed in *Healy*. Pet. 27.

The argument stumbles for failure to note *Healy*'s place in the historical development of forum doctrine. In 1972, when *Healy* was unanimously decided, this court had *never* applied forum analysis to college or secondary school campuses, in the speech or association context.[11]

Forum analysis was first extended to academic environments in *Widmar* v. *Vincent*, which rejected a university's ban on a religious student group's use of its facilities where the exclusion was explicitly "based on the religious content of a group's intended speech." 454 U.S. 263, 269 (1981). As petitioners acknowledge, the *Widmar* Court was clear that "it is on the bases of speech *and association rights* that we decide the case." *Id.* at 273 n.13 (emphasis added); see Pet. 17. Hence *Widmar* establishes, if *Healy* left any doubt, that expressive association claims arising in government-controlled forums are subject to the same forum analysis as claims to pure speech.

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[11] Indeed, neither the opinion under review nor the parties' briefs in *Healy* so much as mention forum analysis. *See Healy* v. *James*, 445 F.2d 1122 (2d Cir. 1971); Br. for Petrs., No. 71-452, 1972 WL 135557; Br. for Resps., No. 71-452, 1972 WL 135558.

Healy is also distinguishable from the instant case because it involved far more extreme restrictions on student speech than those claimed here. Not only did Connecticut State College deny SDS the right to form an approved student group, but SDS was also forbidden from using any sort of campus property for public postings, and students were even forbidden from meeting informally in the coffee shop to discuss SDS. 454 U.S. at 176. In this way *Healy* is closer to *Dale* than to the instant case: A substantial imposition on a group's ability to conduct its affairs, rather than a minimal non-exclusion requirement that does not even arguably challenge the group's ability to engage in its core speech. And of course *Healy* involved college, not secondary-school students', speech. *Id.* at 180.

3. Petitioners' objection to the Ninth Circuit's deployment of forum analysis in the expressive association context—and their claim that expressive association is a "distinct, elemental constitutional purpose," Pet. 28—stem from a fundamental misreading of this Court's First Amendment jurisprudence. The right to expressive association does not exist in a vacuum. Its protection stems from the protection we afford to the underlying rights to free speech and assembly. Government infringements on association rights are objectionable when they interfere with a group's expression of thoughts or ideas. Mere exclusion is not, itself, a protected mode of communication. See, *e.g.*, *Dale*, 530 U.S. at 647-48 ("Implicit in the right * * * protected by the First Amendment is a corresponding right to associate with others * * *. Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.") (quotation marks and citation omitted); *Rumsfeld*,

547 U.S. at 68 ("We have recognized a First Amendment right to associate *for the purpose of speaking*, which we have termed a 'right of expressive association.'" (emphasis added)). Because expressive association is protected for its role in furthering expressive *speech*, the Ninth Circuit was correct to conclude that the level of scrutiny applied to infringements on expressive association tracks the level of protection warranted by the underlying speech right.

Thus, while it is true that *Dale* and its antecedent cases hold that "regulations affecting a group's ability to associate or disassociate must survive strict scrutiny," Pet. 24-25, these cases applied strict scrutiny because the alleged infringement on association affected the group's core speech and expression. *Dale*, *Roberts*, and *Rotary Club* concerned public accommodations laws that were being applied to encompass the *entirety* of an organization's *private and public* activities. The Ninth Circuit was correct to recognize that, in the instant case, restrictions on general, non-voting membership had no cognizable relationship to petitioners' protected speech or expression meriting strict scrutiny review of the imposition of non-discrimination requirements.

4. Unlike *Dale*, *Roberts*, and *Rotary Club*, the instant case involves contested rights of access to a government forum. In a limited public forum or nonpublic forum, governments may impose "viewpoint neutral" regulations that are "reasonable" in light of the forum's purpose. *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 106-107 (2001).

The court below correctly understood that petitioners' First Amendment claims are subject to forum analysis. Pet. App. 30a-31a. That doctrine has frequently been held to encompass government-

provided funds and other schemes that further speech. See, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (applying forum analysis to a university student activities fund that provided funding to student publications); *Texas* v. *Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (applying forum analysis to state Adopt-a-Highway program); *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985) (applying forum analysis to examine government's exclusion of certain groups from participating in federal workplace charity drive).

The Ninth Circuit correctly applied forum analysis to ascertain that ASB status constitutes a "limited public forum." The government creates a "limited public forum" when it intentionally "opens a non-public forum to certain kinds of speakers or to the discussion of certain subjects." *Husain* v. *Springer*, 494 F.3d 108, 121 (2d Cir. 2007) (quotation marks and citation omitted); see also *Good News Club*, 533 U.S. at 106 ("When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'" (quoting *Rosenberger*, 515 U.S. at 829) (alteration in original)). Restrictions on speech must be "'reasonable in light of the purpose served by the forum" and "must not discriminate against speech on the basis of its viewpoint.'" *Id.* at 106-107 (citing *Rosenberger* and *Cornelius*).

Mandating that potential speakers comply with a non-discrimination policy in order to gain access to a limited government forum is both "reasonable" and "viewpoint neutral." *R.A.V.*, 505 U.S. at 390 ("Where

the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.") See also *Boy Scouts of America* v. *Wyman*, 335 F.3d 80, 98 (2d Cir. 2003) (group's removal from nonpublic forum did not violate right to expressive association); *Evans* v. *City of Berkeley*, 129 P.3d 394, 402 (Cal. 2006) (same). The Ninth Circuit correctly concluded that—provided respondents' administration of the ASB program was not a pretext for viewpoint discrimination—the restriction on petitioners' ability to exclude students from non-voting membership should be upheld as an appropriate regulation of its limited forum. *Cf. Cornelius*, 473 U.S. at 811-13 (noting that "[t]he existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination," and remanding for determination of "whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view").

5. Petitioners' argument that expressive association claims must *always* receive strict scrutiny, even when arising from restrictions on a limited public forum, therefore borders on the absurd. Following petitioners' rule, expressive association would receive greater protection than the underlying right to *speech* in the forum. The Ninth Circuit correctly rejected that claim since, as explained *supra*, the associational right is itself only an outgrowth of the relevant right to speech in the forum. Pet. App. 37a (Fisher, J., concurring).

Indeed, petitioners' proposal would undo decades of law establishing that "strict scrutiny [does not]

appl[y] whenever [government] subsidizes some speech, but not all speech." *Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983) (upholding denial of charitable exemptions to organizations attempting to influence legislation); see also *Grove City College* v. *Bell*, 465 U.S. 555, 575-76 (1984) ("Requiring [petitioner college] to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the program [providing federal financial assistance] infringes no First Amendment rights of the College or its students."); *Cammarano* v. *United States*, 358 U.S. 498 (1959) (upholding Treasury regulation that denied business expense deduction for lobbying activities). Restrictions on associational exclusion, like other restrictions on expressive activity in limited public forums, must be subject to reasonable, viewpoint-neutral regulation.

* * *

The Ninth Circuit correctly concluded that neither the EAA nor the First Amendment confers greater rights of associational exclusion than they do rights of speech; that the ASB status at issue in this case is properly analyzed as a limited public forum; and that, under established doctrine, respondents were entitled to apply reasonable, viewpoint-neutral nondiscrimination restrictions on applicants for ASB status.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009

SUPPLEMENTAL BRIEF

125 (2)

Supreme Court, U.S.
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No. 08-1130

IN THE
SUPREME COURT OF THE UNITED STATES

TRUTH, an unincorporated association, et al.,

Petitioners,

v.

KENT SCHOOL DISTRICT, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 15.8 of this Court, petitioners file this supplemental brief to bring to this Court's attention a new authority that underscores the need to grant review in this case.

One week after petitioners filed their petition for writ of certiorari, the Ninth Circuit rendered its decision in *Christian Legal Society Chapter of the University of California v. Kane*, No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009) ("*Kane*").[1] *Kane*, similar to the facts described in this petition, involved University of California, Hastings College of the Law ("UC Hastings") denying Christian Legal Society ("CLS") "registered" club status, and appurtenant benefits, including access to school facilities for meetings and office space, eligibility for funding from the school, and access to a number of channels of communication on campus. *Christian Legal Society Chapter of the Univ. of Cal. v. Kane*, 2006 WL 997217, *1 (N.D. Cal. 2006).

The *Kane* decision is significant because the Ninth Circuit premised its holding entirely on the precedent established in *Truth*, confirming that *Truth* is not a narrow decision limited to its facts, but one that fundamentally alters the legal landscape for the expressive associational freedoms of student clubs.

As a precondition for registration, UC Hastings forces student clubs to abide by the law

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[1] This decision is reprinted in the Appendix ("App.") attached to this supplemental brief.

school's non-discrimination policy. *Id.* at *2. The non-discrimination policy requires every registered student club to permit any student to participate, become a member, or become a leader, irrespective of that student's beliefs and irrespective of the effect on the group. *Id.* at *3. Accordingly, UC Hastings concluded that the CLS Statement of Faith for voting members and code of conduct requirements for officers violated its non-discrimination policy, and denied CLS's application for status as a registered student organization on that singular basis. *Id.*

CLS challenged its exclusion from the law school's forum for student organizations, claiming UC Hastings violated the group's First Amendment right to expressive association, among other claims. *Id.* at *4. The district court granted summary judgment in the law school's favor, and CLS appealed the decision. *Id.* at *27.

One week following the oral argument for the appeal, the Ninth Circuit issued an unpublished two-sentence decision summarily rejecting the expressive association claim and affirming the district court's ruling. App. 2a.[2] For this decision, the panel cited one isolated authority, *Truth v. Kent School District*, 542 F.3d 634 (9th Cir. 2008), and upheld the constitutionality of the law school's non-discrimination policy as viewpoint neutral and reasonable. App. 2a. The *Truth* decision - representing the binding precedent in the circuit -

[2] The decision offers little reasoning and is fittingly designated "not for publication." App. 1a-2a.

foreclosed any meaningful legal analysis of the expressive association claim.[3]

The *Kane* decision reveals that the *Truth* opinion is not limited to the facts of the case. Far from it, *Kane* exposes the overreaching impact of *Truth* in three distinct ways – each compounding the constitutional shortcomings that saturate the *Truth* decision.

First, *Truth*'s rationale goes beyond the high school setting and expands its restrictions to cover university student groups as well – where First Amendment protection is supposed to be at its apex. *See, e.g., Keyishian v. Bd. of Regents of the Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (citation omitted). In the Ninth Circuit, college students, along with high school students, have lost their expressive association rights.

Second, while *Truth* involved a student club's selection of general members, schools may use *Truth*'s rationale to restrict how clubs select officers and voting members. These positions must now be open to non-adherents.

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[3] One of the three judges on the *Kane* panel, Judge Bea, wrote an opinion dissenting from the Ninth Circuit's denial of en banc review in *Truth*. In this opinion, Judge Bea strongly criticized the *Truth* panel's misapplication of this Court's expressive association jurisprudence. *Truth v. Kent Sch. Dist.*, 551 F.3d 850, 855-57 (9th Cir. 2008) (Bea, J., dissenting from denial of rehearing en banc). But despite his misgivings about the analysis in *Truth*, Judge Bea was compelled to adhere to *Truth* as binding authority in the Ninth Circuit.

Finally, as illustrated in *Kane*, *Truth*'s rationale allows schools to demand every student club permit any student to join and/or lead the club, no matter how significantly that student might alter the club's identity and message. Thus, a school may force the Young Democrats Club to allow a Republican to be its president or require the vegetarian club to grant voting privileges to meat-eaters. There could be no greater intrusion on a group's expressive association; yet, as long as a school forces every student club to accept all comers, the policy is *per se* viewpoint-neutral and reasonable – and hence constitutional – under the flawed legal framework formed by the Ninth Circuit in *Truth*.

Kane demonstrates that the *Truth* decision is not a one-time aberration, but a ruling that signifies lasting and adverse consequences to the right to expressive association in various contexts. And, because this result conflicts with holdings of this Court, and other circuits, Truth's petition for writ of certiorari ought to be granted.

Respectfully Submitted,

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APPENDIX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, aka Hastings Christian Fellowship,
Plaintiff-Appellant,
v.
MARY KAY KANE; in her official capacity as Chancellor and Dean of University of California, Hastings College of the Law; JUDY CHAPMAN, in her official capacity as Director of Student Services for University of California, Hastings College of the Law; MAUREEN E. CORCORAN; EUGENE L. FREELAND; CARIN T. FUJISAKI; JOHN T. KNOX; JAN LEWENHAUPT; JAMES E. MAHONEY; BRIAN D. MONAGHAN; BRUCE L. SIMON; JOHN K. SMITH; TONY WEST, in their official capacities as the Board of Directors of the University of California, Hastings College of the Law,
Defendants-Appellees.

No. 06-15956

D.C. No. CV-04-04484-JSW

MEMORANDUM*

FILED
MAR 17 2009
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U.S. COURT OF APPEALS

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Argued and Submitted
March 10, 2009—San Francisco, California

Before: Kozinski, Chief Judge,
and
Hug and Bea, Circuit Judges.

The parties stipulate that Hastings imposes an open membership rule on all student groups--all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable. Truth v. Kent Sch. Dist., 542 F.3d 634, 649-50 (9th cir. 2008).

AFFIRMED

130

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No. 08-1268

IN THE
SUPREME COURT OF THE UNITED STATES

KENT SCHOOL DISTRICT, et al.,

Petitioners,

v.

TRUTH, an unincorporated association, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This petition concerns the fundamental right of a religious student group to maintain its religious identity through its membership. The District nondiscrimination policy forces Truth to accept anyone as a member, even those whose views or conduct are inimical to the club's core ideology, while allowing secular clubs unquestioned freedom to form membership according to group values. The Ninth Circuit found no fault with this policy. And, if allowed to stand, this decision will deprive Truth – and countless other religious student groups – of fundamental associational freedoms crafted in the Equal Access Act and birthed in the First Amendment.

I. THE ISSUES BEFORE THIS COURT ARE FULLY DEVELOPED AND WILL NOT BE AFFECTED BY THE NARROW, UNRELATED ISSUE ON REMAND.

The District asks this Court to decline review on the important statutory and constitutional issues raised in Truth's petition, loosely claiming that such would give this Court "the benefit of the additional factual development on remand." Resp., 16. In reality, the issues raised in the petition are fully developed and the remand pertains to a narrow, unrelated question. The Ninth Circuit aptly describes this as a "limited" question that is "different in kind" than the issues before this Court. App. 28a. It is focused entirely on how the District applied its policy to a couple of other clubs in respect

to sex -- a discrete factual matter – and the present issues deal with the impact of the policy on Truth.

The district court and Ninth Circuit will not reconsider any of the issues presented in this petition, and thus, the proper time for this Court to review is now.

II. THE NINTH CIRCUIT'S EQUAL ACCESS ACT ANALYSIS WARRANTS THIS COURT'S REVIEW.

One of the most remarkable aspects of the Ninth Circuit's decision is its refusal to interpret the Equal Access Act to protect students' expressive associations. This effectively puts nondiscrimination policies – and their adverse impact on associational rights – beyond the reach of the Act, and in direct conflict with the Second Circuit's holding in *Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996).

Like the Ninth Circuit, the District tries to marginalize Truth's membership requirements as mere "acts." Resp., 18-19. But the labeling cannot negate the expressive aspect of membership. Invariably, membership is expression because "personnel *is* policy." App. 153a (Bea, J. dissenting) (citation omitted). This certainly holds true for Truth. Truth specifically observes in its charter that "[t]he character, behavior, speech and conduct of every person participating in the club reflects upon the religious expression and association of the club." App. 178a. For this precise reason, Truth requires every member to "comply[] in good faith and

Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible." App. 7a, 178a. The qualification for membership is tied directly to the expression the group wants to share both internally and externally.

The District –- echoing the Ninth Circuit – claims that *Hsu* is distinguishable because the club in that case sought to impose a religious test for its leadership positions, while Truth imposes such a test for all its members. Resp., 9-10; App. 27a-28a (distinguishing *Hsu* solely on this basis). But the District, like the Ninth Circuit, places major emphasis on a minor difference. The leadership criteria upheld in *Hsu* would necessarily be struck down under the legal analysis set out in *Truth*. By viewing nondiscrimination policies as merely regulating conduct, the Ninth Circuit does not believe that the Act's protections contemplate such policies at all, irrespective of their effect on expressive associations. App. 21a-28a.

Contrast that with the Second Circuit, which saw in the Act's plain language and legislative history "an implicit right of expressive association." *Hsu*, 85 F.3d at 859. As a result, the court grounded its analysis of the school district's nondiscrimination policy in the nexus between the group's purpose for existence and its exclusionary practice, leaning heavily on this Court's expressive association jurisprudence. *Id.* at 858-59. With the right nexus, the court explained, an exclusionary practice may foster a group's shared interest in communicating a particular viewpoint. *Id.* at 859. Such was the case

with the Christian club before the Second Circuit. The group's purpose was religious, and its religious test for certain officers was deemed "essential to the expressive content of the meetings and to the group's preservation of its purpose and identity, and [thus] protected by the Equal Access Act." *Id.* at 848.

Against this backdrop, the District carelessly proclaims that "the Second Circuit would reach the same conclusion with respect to the issue presented here." Resp., 9. As *Hsu* indicates, the Second Circuit would examine the group's religious purpose and basis for exclusion prior to reaching any conclusion about the matter. The Ninth Circuit, on the other hand, does not bother with consideration of any nexus between Truth's purpose and its exclusionary practice. Upon finding the District's nondiscrimination policies to be in existence, the court went no further. App. 64a.

Aside from hypothetical outcomes of particular cases, the District glosses over the larger and more significant point: the Second Circuit and Ninth Circuit differ deeply on whether the Equal Access Act covers expressive association freedoms. While different circumstances can dictate different results, the District cannot possibly harmonize *Hsu* with *Truth* with *Hsu* being more faithful to the meaning of the Act.[1] And this great divide between

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[1] As described in the Petition, the intention to protect expressive associations is undergirded by the legislative history of the Act. Pet., 18-19. The District denigrates Truth's recitation of legislative history as a "fragment," but tellingly, fails to supplement with any legislative backing of its own. Resp., 18.

Second and Ninth Circuits – regarding suitable interpretation and application of the Equal Access Act – requires this Court's immediate attention.

III. THE NINTH CIRCUIT'S EXPRESSIVE ASSOCIATION ANALYSIS WARRANTS THIS COURT'S REVIEW.

This Court's ruling in *Boy Scouts of America v. Dale* requires strict scrutiny of any state action that intrudes on a group's membership. 530 U.S. 640, 648 (2000). The Ninth Circuit eschewed this standard for Truth's expressive association claim, in favor of forum analysis. App. 68a.

In defending the nonconforming shift in legal analysis, the District theorizes that *Dale* and the balance of this Court's expressive association jurisprudence can be jettisoned on the grounds that this Court has yet to entertain expressive association in the context of a government forum, that is, after the advent of forum analysis. Resp., 21-23.[2] Since this Court has never mentioned venue as a factor in assessing expressive association claims, the departure from traditional doctrine is suspect. Even so, the fact that the Ninth Circuit has taken a divergent view on *Dale* – and employed a radically different approach for evaluating expressive association claims – only underscores the necessity for this Court's intervention.

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[2] The District also tries to distinguish *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), *Roberts v. U. S. Jaycees*, 468 U.S. 609 (1984), and *Healy v. James*, 408 U.S. 169 (1972) on this same basis.

The District also urges that the instruction of *Dale* be shunned - and forum analysis be embraced - because the restriction on Truth is not direct, but rather an indirect impact via access. Resp., 24-25. But this rationale is not supported by any precedent. Indeed, this Court has repeatedly affirmed that inappropriate interference with expressive association "may take many forms." *Dale*, 530 U.S. at 658; *Roberts*, 468 U.S. at 622. The right to expressive association is protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).[3]

The Ninth Circuit diverges from this Court's holdings chiefly on the stubborn insistence that expressive association is nothing more than speech

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[3] The District further protests in vain that applying strict scrutiny to an expressive association claim in a limited public forum "would undo decades of law establishing that strict scrutiny does not apply whenever government subsidizes some speech, but not all speech." Resp., 27-28 (quotation marks and citations omitted). The instant case is no more a subsidy case than *Healy*. But even if equal access could be depicted as a "subsidy," this Court has explained that its "unconstitutional conditions" doctrine prohibits the government from "plac[ing] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis in original). This condition is precisely what the District is imposing on Truth, as Truth is required to abandon its membership criteria and core identity beyond the realm of the forum itself.

and should be regulated as speech. App. 37a; Resp., 25. This view overlooks that the right of expressive association is linked to multiple constitutional protections besides the freedom of speech, in particular, the freedoms of assembly, petition, and religious exercise. *Roberts*, 468 U.S. at 622. Thus, it is not fitting to treat an intrusion on a group's expressive association the same as an intrusion on pure speech. These rights, while interrelated, are not coextensive. And the conflating of the two - as the Ninth Circuit has done - unduly weakens this fundamental liberty.

Healy recognized the critical importance of protecting associational rights, and did so in a government-controlled forum. There, similarly to here, a state university denied official recognition to a student club because it disagreed with the philosophy of the group. *Healy*, 408 U.S. at 175. And this Court found that the university could not satisfy its "heavy burden" to justify this intrusion into the club's associational rights. *Id.* at 184.

In an attempt to circumvent *Healy*, the Ninth Circuit implicitly, and the District explicitly, portray *Healy* as an obsolete precedent that has effectively been overshadowed by this Court's subsequent public forum cases. Resp., 23. Had *Healy* come later, the District asserts, this Court would have applied forum analysis instead.[4] This is wild speculation (at

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[4] The District claims that *Widmar v. Vincent*, 454 U.S. 263 (1981) "establishes" that *Healy* has been overruled, and forum analysis is proper for expressive association claims arising in government-controlled forums. Resp., 23. But *Widmar* never makes such a claim. Contrary to the District's contention, this

best) and cannot possibly validate the decision below. The Ninth Circuit was obliged to follow *Healy* up and until this Court expressly overrules it. *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").[5]

In contrast to the Ninth Circuit, the Seventh Circuit dutifully applied *Dale* and *Healy* in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), a student-club case much like this one. The District strains to evade the obvious conflict and reconcile the two opinions, plodding through a series of insubstantial aspects of *Walker* while largely mischaracterizing the import of the decision, but to no avail. None of the District's arguments diminish

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Court did not even employ forum analysis in the case. And even though the regulation in *Widmar* triggered both pure speech and associational concerns, the speech claim was emphasized because the restriction was limited to the forum. There, a public university made its facilities generally available to student clubs to use for meetings, but prohibited clubs from using the facilities "for purposes of religious worship or religious teaching." *Id.* at 265. Unlike the restrictions in this case, and in *Healy*, the *Widmar* restriction did not attach to clubs apart from the forum.

[5] The District also characterizes the facts in *Healy* as being "far more extreme" than this case. Resp., 24. But, in actuality, Truth is seeking the same access as the club in *Healy*.

the square contradiction on expressive association rights.[6]

The District's primary argument is that *Walker* can be distinguished because it involved CLS's criteria for voting members and officers. Resp., 11-12. This detail is more of a distraction than a meaningful distinction.

Contrary to the District's claim, the Seventh Circuit did not specify restriction on voting members or leaders as being relevant to the impairment on CLS in *Walker*. Instead, the appellate court placed significance on the "presence" of individual members holding views antithetical to the group's ideology. *Walker*, 453 F.3d at 861-62.[7] The *Walker* court explained that forcing CLS "to accept as *members* those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist." *Id.* at 863 (emphasis added). It was not the act of voting or leading that caused these unwelcome members to alter the group's expressive association, but - as the

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[6] For example, the District's lead argument points to the Seventh Circuit finding it unlikely that the university policy applied to CLS, and says that the holding distinguishes *Walker* from the instant case (Resp., 11), but the presence of an additional ruling does not eradicate a conflict explicitly set out in the opinion.

[7] The Seventh Circuit was simply following the lead of this Court in *Dale*. *Walker*, 453 F.3d at 861-64. In this case concerning a non-voting member of the Boy Scouts, this Court stressed: "the presence of Dale as an assistant scoutmaster would ... surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Dale*, 530 U.S. at 640.

Seventh Circuit understood and articulated – it was their formal association with the club. This same concern applies to Truth and its intended message.

The District also claims that *Walker* is distinguishable from this case because it arose in the university setting. Resp., 13-14. This notion, though, was recently dispelled in *Christian Legal Society Chapter of the University of California v. Kane*, No. 06-15956, 2009 WL 693391 (9th Cir. Mar. 17, 2009) ("*Kane*"). *See* Supplemental Brief in Support of Petition (expounding on how *Kane* demonstrates the broad ramifications of *Truth*). There, in a case involving a law school club, the Ninth Circuit confirmed that its analysis applies with equal force in the university setting.

Additionally, the District claims that *Walker* and the decision below are not in conflict because the courts evaluated the clubs' free speech claims in the same way. Resp., 12-13. And, with this, the District is mistaken again. Unlike the Ninth Circuit, *Walker* rightly analyzed CLS's expressive association claim apart from its free speech claim. 453 F.3d at 861-865.[8]

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[8] The District appears to suggest that the Seventh Circuit would have applied forum analysis to CLS's expressive association claim if not for its finding of viewpoint discrimination. Resp., 12. And yet, the Seventh Circuit did not mention the nature of the forum until it reached CLS's free speech claim – after it already concluded that the club was likely to succeed on its expressive association claim. *Walker*, 453 F.3d at 865.

The District further disputes any conflict between the decision below and *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000). In *Cuffley*, the Eighth Circuit considered expressive association and free speech challenges from the Ku Klux Klan after it was excluded from a state Adopt-A-Highway program. Taking a more traditional route than the Ninth Circuit here, the *Cuffley* court did not apply forum analysis to the expressive association claim, even though the issue concerned access to a limited public forum. 208 F.3d at 708-09.

The District misses the point in contending that the Eighth Circuit "did not have to consider the nature of the forum because it found that the defendant had engaged in viewpoint discrimination." Resp., 14. The court's viewpoint discrimination analysis had nothing to do with its expressive association analysis. Citing this Court's line of expressive association cases, the Eighth Circuit found the nondiscrimination policy violative of the Klan's "freedom of political association." *Id.* at 708.

In short, *Walker* is "on all four with our case," and in sidestepping *Dale* and *Healy*, the Ninth Circuit "clearly establishes a circuit conflict." App. 162a. The same is true for *Cuffley*. This conflict among the circuits warrants review.

CONCLUSION

For the foregoing reasons, this Court should grant Truth's Petition for Writ of Certiorari.

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IN THE
Supreme Court of the United States

TRUTH, ET AL.,

Petitioners,

v.

KENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CAMPUS CRUSADE FOR CHRIST, AND INTERVARSITY CHRISTIAN FELLOWSHIP/USA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

Christian Legal Society ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. As set forth in the brief, numerous public law schools have denied (or threatened to deny) CLS student chapters access to meeting space, funding, and other benefits because they draw their leaders and voting members from among those who share their core religious viewpoints. Through its Center for Law & Religious Freedom, CLS frequently advocates for the religious freedom of its law student chapters and other student religious groups.

Campus Crusade for Christ ("CCC") has student chapters meeting at 731 universities and colleges across the country, including student chapters at 417 public universities and colleges. CCC also operates Student Venture, a ministry geared towards high school students. The purpose of CCC is to fulfill the Great Commission, Jesus' command to His disciples to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey

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[*] Counsel of record were notified on March 26, 2009, of the *amici*'s intent to file this brief. The parties consented to the filing of this brief, and copies of the consent letters are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

everything I have commanded you." Matthew 28:19-20.

Specifically, the goal of its student chapters is to reach every student at their campuses every year with the Gospel. Its leaders are to be effective witnesses of the Gospel to other students. At numerous public universities, CCC student groups have been threatened with denial of equal access to meeting space, funding, and other benefits because they set religious criteria for their leadership.

InterVarsity Christian Fellowship/USA ("IVCF") has as its purpose to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God's Word, God's people of every ethnicity and culture and God's purposes in the world. IVCF carries out its ministry through student chapters. Officers of those chapters are required to subscribe to the purpose and doctrinal basis of IVCF and must subscribe to certain basic biblical truths of Christianity. Currently, IVCF has approximately 855 chapters on 556 campuses in the United States, including chapters at 299 public universities and colleges. Many IVCF student chapters at public universities have been threatened with denial of equal access to meeting space because they set religious criteria for their leadership.

SUMMARY OF ARGUMENT

The *amici* agree with the Petitioners that the Ninth Circuit erred in interpreting and applying the Equal Access Act;[1] that the Ninth Circuit erred in interpreting and applying the Constitution; and that this Court ought to grant the petition for a writ of certiorari.

The *amici* write separately to inform the Court that the Ninth Circuit has already extended *Truth v. Kent School District* to the higher education context; to urge the Court to grant the petitions for writ of certiorari both in this case and in *Christian Legal Society v. Newton*; and to describe the magnitude of the problem illustrated by the *Truth* and *Newton* cases.

ARGUMENT

I. THE NINTH CIRCUIT HAS EXTENDED *TRUTH v. KENT SCHOOL DISTRICT* TO UNIVERSITIES, THE QUINTESSENTIAL "MARKETPLACE OF IDEAS."

The *amici* urge this Court to review and reverse *Truth v. Kent School District* because the Ninth Circuit quickly and inexplicably extended that decision to colleges and universities. In *Christian Legal Society v. Kane*, 2009 WL 693391 (9th Cir. 2009), *petition for cert. filed sub nom. Christian*

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[1] *Amicus* CCC has a particular interest in this Court's resolution of Truth's Equal Access Act claim, for it operates Student Venture, a ministry geared towards high school students.

Legal Soc'y v. Newton (May 5, 2009),[2] the Ninth Circuit explicitly relied upon *Truth* to reject the constitutional claims of a religious student group, the Christian Legal Society chapter at Hastings College of the Law, that had been denied recognition under the public law school's nondiscrimination rule.

A. Registered Student Groups at Hastings

Like most institutions of higher learning, Hastings encourages the formation and vibrant operation of student groups in order to promote "the expression of a variety of viewpoints." As this Court has recognized, the "avowed purpose" for recognizing student groups is "to provide a forum in which students can exchange ideas." *Widmar v. Vincent*, 454 U.S. 263, 272 n.10 (1981). *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (university's forum for student groups "facilitate[es] the free and open exchange of ideas by, and among, its students"); *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819, 834 (1995) (university's forum for student groups "encourage[s] a diversity of views from private speakers").

Recognition confers various benefits upon "Registered Student Organizations" (RSOs), including access to reserved meeting space, various

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[2] The district court and Ninth Circuit opinions are styled *Christian Legal Society v. Kane*, reflecting the name of the former dean of the Hastings College of the Law. Given that Nell Jessup Newton is now the dean, the petition for writ of certiorari is styled *Christian Legal Society v. Newton*. *See* Sup. Ct. R. 35.3. For the sake of convenience and clarity, this brief will generally refer to the district court and Ninth Circuit decisions as *Christian Legal Society v. Newton*.

mechanisms for communicating with the law school community, and funding.

Hastings has recognized groups formed to express viewpoints on topics such as politics, religion, culture, and human sexuality. Recognized groups include Outlaw (a group advocating for the interests of homosexual and bisexual students), the Black Law Students Association, the Clara Foltz Feminist Society, Silenced Right: National Alliance Pro-Life Group, Law Students for Choice, Hastings Republicans, Hastings Democratic Caucus, and the Vietnamese American Law Society.

Hastings requires groups seeking recognition to include its Nondiscrimination Policy in their constitutions. The policy declares that Hastings will not discriminate on the basis of religion and sexual orientation, among other things. Although the Nondiscrimination Policy enumerates nine protected categories, Hastings asserts that it requires RSOs to "allow any student to participate, become a member, or seek leadership positions in the organization, regardless of their status or beliefs." Hastings has recognized many groups whose constitutions provide that their officers and voting members should agree with their organizations' missions and viewpoints.

B. Christian Legal Society

Founded in 1961, Christian Legal Society is a nationwide association of lawyers, law students, law professors, and judges who profess faith in Jesus Christ. Its purposes include providing a means of society, fellowship, and nurture among Christian

lawyers; encouraging, discipling, and aiding Christian law students; promoting justice, religious liberty, and biblical conflict resolution; and encouraging lawyers to furnish legal services to the poor. In furtherance of its purposes, the national Christian Legal Society maintains attorney and law student chapters across the country, including one at Hastings.

CLS welcomes all Hastings students to attend and participate in its meetings and other activities. CLS wants persons who are not CLS members to come, listen, and participate in hopes they will be persuaded to agree with CLS's religious viewpoints. CLS, however, does not allow nonmembers to vote on chapter decisions or lead the group. CLS has only one category of membership: voting members, who are eligible to choose the group's officers, stand for election to officer positions, amend the group's constitution, vote on chapter business, and teach weekly Bible studies. A student who wishes to become a voting member of CLS must affirm a commitment to the group's foundational principles by signing the national CLS Statement of Faith, which articulates beliefs commonly regarded as orthodox in the Protestant evangelical and Catholic traditions. An individual raised in a faith other than Christianity is eligible for voting membership if he or she affirms the Statement's orthodox Christian tenets. Conversely, a person raised as a Christian is not eligible if he or she no longer can affirm the Statement of Faith.

In light of contemporary controversies regarding human sexuality within various religious

denominations, national Christian Legal Society reaffirmed in March 2004 its understanding of biblical principles of sexual morality and explained how that understanding derives from its Statement of Faith. It stated, "In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership."

A person who advocates or unrepentantly engages in sexual conduct outside of marriage between a man and a woman is not considered to be living consistently with the Statement of Faith and, therefore, is not eligible for leadership or voting membership. A person's mere experience of same-sex or opposite-sex sexual attraction does not determine his or her eligibility for leadership or voting membership. CLS individually addresses each situation that arises in a sensitive Biblical fashion.

Hastings concluded that CLS violated its Nondiscrimination Policy on the basis of religion and sexual orientation and thus denied CLS recognition. The chapter commenced civil rights litigation in federal court, claiming that Hastings violated its constitutional rights.

C. Court Proceedings

The district court ruled against CLS at the summary judgment stage. *Christian Legal Society v.*

Newton, 2006 WL 997217 (N.D. Cal. 2006). CLS appealed to the Ninth Circuit. In its briefing, CLS relied heavily upon the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006), a case involving a different chapter of *the very same national organization* denied recognition based on a public law school's nondiscrimination policy.

After briefing, the Ninth Circuit postponed oral argument pending its resolution of *Truth*. As set forth in Truth's petition in the instant case, the Ninth Circuit eventually concluded that it should *not* analyze whether Kent School District's application of its nondiscrimination policy impaired Truth's ability to control the content of its message and, if so, whether such an impairment was the least restrictive means of advancing a compelling governmental interest. *Truth*, 542 F.3d at 651, 652 (Fisher & Wardlaw, JJ., concurring). Instead, it simply analyzed whether the exclusion was viewpoint neutral and reasonable in light of the purposes served by the forum.

Having disposed of *Truth*, the Ninth Circuit scheduled oral argument in *Newton*. One week after oral argument, the court issued a two sentence opinion citing *Truth*, 542 F.3d 634, and affirming the decision of the district court. Applying "the lesser standard of scrutiny" utilized in *Truth*, the Ninth Circuit held that Hastings' denial of recognition of CLS was "viewpoint neutral and reasonable" and thus constitutionally permissible. Without discussion, the Ninth Circuit extended *Truth* from the high school to the higher education context.

Given that the *amici* operate primarily on the campuses of higher educational institutions, the Ninth Circuit's decisions in *Truth* and *Newton* undermine their constitutional rights and thus their ability to express their religious messages. Accordingly, the *amici* urge this Court to grant the petition.

II. THE COURT SHOULD GRANT THE PETITIONS IN BOTH THIS CASE AND IN *CHRISTIAN LEGAL SOCIETY v. NEWTON*, FILED MAY 5, 2009.

The Christian Legal Society chapter at Hastings filed a petition for a writ of certiorari in this Court on May 5, 2009. The *amici* urge the Court to grant the petitions in that case ("*Newton*") and in the instant case ("*Truth*").

As Truth argues in its petition, the Ninth Circuit's ruling in *Truth* created a conflict with *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). The Ninth Circuit's ruling in *Newton* creates an even clearer conflict because both cases involve chapters of the same national organization, identical material facts, and the same legal claims, but reach diametrically opposite results.

In *Walker*, the dean of Southern Illinois University School of Law derecognized the Christian Legal Society chapter because he believed its requirement that officers and voting members share its religious viewpoints violated the school's antidiscrimination policy. *Walker*, 453 F.3d at 857-

58. The chapter sued, raising expressive association and free speech claims. The Seventh Circuit properly applied this Court's precedents to the expressive association claim before separately applying forum analysis to the free speech claim. *Id.* at 861-67.

With regard to CLS's expressive association claim, the Seventh Circuit correctly applied *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), to determine whether the law school's application of its antidiscrimination policy to the chapter "affect[ed] in a significant way the group's ability to advocate its viewpoint." *Walker*, 453 F.3d at 861-63 (internal citations and quotations omitted). "To ask this question," according to the court, "[wa]s very nearly to answer it." *Id.* at 862. The court concluded, "[i]t would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id.* at 863. Indeed, "[t]he only apparent point of applying the policy to an organization like CLS is to induce CLS to modify the content of its expression or suffer the penalty of derecognition." *Id.*

Following *Dale*, the Seventh Circuit then correctly applied strict scrutiny. *Id.* "In order to justify interfering with CLS's freedom of expressive association, [the law school]'s policy must serve a compelling state interest that is not related to the suppression of ideas and that cannot be achieved through a less restrictive means." *Id.* The court

held that the school had identified no interest in applying its policy to the chapter. *Id.*

As discussed above, the district court and the Ninth Circuit in *Newton* declined to follow the Seventh Circuit's *Walker* decision. Diverging from this Court's expressive association jurisprudence, the Ninth Circuit failed to consider whether Hastings' application of its Nondiscrimination Policy to CLS "affect[ed] in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648. Nor did the Ninth Circuit apply the requisite level of scrutiny—strict scrutiny. Instead, following the erroneous approach of *Truth v. Kent*, the court refused separately to consider *all* of CLS's claims—expressive association, free speech, free exercise of religion, and equal protection—and asked only whether Hastings' application of its policy to CLS was "viewpoint neutral and reasonable."

The complementary facts in *Christian Legal Society v. Newton* and this case militate in favor of granting both petitions so that this Court can fully resolve the problem and provide guidance to the lower federal courts.

The *Truth* case, of course, involves a high school, rather than a university. Therefore, the Equal Access Act applies, whereas the Act is inapplicable to universities and graduate schools. Equal Access Act, 20 U.S.C. §§ 4071-4074. This Court may well decide *Truth* solely on *federal statutory* grounds applicable only to *secondary* schools, leaving unresolved the circuit conflict over *First Amendment* protection at

the *university* level of a religious group's right to draw its officers and voting members from among those who share its core religious commitments. It would be an odd result if religious associations were protected under the Equal Access Act in secondary schools, but their First Amendment protection at the college level was left uncertain.

Furthermore, *Newton* directly raises an issue that *Truth* expressly left open: whether requiring a religious student group to accept *officers and voting members* who disagree with the group's core religious commitments violates the First and Fourteenth Amendments. The *Truth* decision is explicitly limited to the club's "general membership restrictions." *Truth,* 542 F.3d at 644, 647. To be sure, the Ninth Circuit erred in *Truth* by diminishing the associational import of Truth's "general members"; it most certainly erred in *Newton*, where CLS had elevated associational interests in its voting members and leaders, who elect officers, stand for election, amend the group's constitution, lead Bible studies, vote on chapter business, organize group activities, and invite guest speakers for weekly meetings and campus-wide events. Without explanation, the Ninth Circuit in this case extended its *Truth* decision to CLS's selection of voting membership and leadership.

By granting both petitions, the Court would have before it the full breadth of the issues upon which the circuit courts have split and which continue to vex school administrators and lower courts. The Court could provide meaningful guidance to lower

courts, as well as national student organizations and education officials carefully watching this issue.

III. PUBLIC UNIVERSITY OFFICIALS' DENIAL OF RECOGNITION TO RELIGIOUS STUDENT GROUPS BECAUSE THEY REQUIRE THEIR LEADERS AND VOTING MEMBERS TO SHARE THEIR RELIGIOUS VIEWPOINTS IS A RECURRING AND PERVASIVE NATIONWIDE PROBLEM.

The Ninth Circuit has given public university officials the green light to derecognize religious student groups simply because they require their officers and voting members to agree with their core religious convictions. Within the Ninth Circuit alone, the extension of *Truth* to the college and university context affects over three million students enrolled at approximately 317 public institutions of higher learning, or approximately 23% of the nation's college, university, and graduate students.[3] This case will reverberate nationally because it has been closely watched. *See, e.g.*, Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student*

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[3] These figures are calculated from the 2000 United States census. U.S. Census Bureau, Census 2000 Summary File 3 (SF 3) - Sample Data, QT-P19. School Enrollment: 2000, at http://factfinder.census.gov (click "get data" under "Decennial Census," then click "Census 2000 Summary File 3 (SF 3) - Sample Data," then click "Enter a Table Number," then enter "QT-P19" and press Enter, then select State, and select Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington and click Show Result; see figures for college, undergraduate, graduate, and professional school students at public schools).

Groups, 42 U.C. Davis L. Rev. 889, 892 n.4 (2009) (collecting selected articles on topic); Ryan C. Visser, Note, *Collision Course?:* Christian Legal Society v. Kane *Could Create a Split over the Right of Religious Student Groups to Associate in the Face of Law School Antidiscrimination Policies,* 30 Hamline L. Rev. 449 (2007); Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations,* 118 Harv. L. Rev. 2882 (2005); Patricia A. MacLean, *Law School Need Not Support Religious Club that Discriminates*, National Law Journal, Mar. 23, 2009, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429159976 (last visited Apr. 9, 2009); Burton Bollag, *Choosing Their Flock*, Chronicle of Higher Education, Jan. 28, 2005, *available at* http://chronicle.com/free/v51/i21/21a03301.htm (last visited Apr. 30, 2009).

CLS student chapters across the nation have had to resort to litigation after being threatened with loss of access to campuses because of alleged discrimination based on religion or sexual orientation. As discussed in the certiorari petitions in *Christian Legal Society v. Newton* and in this case, officials at Southern Illinois University revoked a CLS chapter's recognition on the ground that its Statement of Faith requirement constituted discrimination. The Seventh Circuit held that SIU officials violated the chapter's constitutional rights. *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006).

At Washburn University School of Law, a student who explicitly rejected CLS's statement of faith filed

a religious discrimination complaint against the CLS chapter because it refused to allow him to lead its Bible studies after he led a study contrary to CLS's religious viewpoints. The university restored recognition only after CLS filed suit. *Christian Legal Soc'y Chapter of Washburn Univ. Sch. of Law v. Farley*, No. 04-4120 (D. Kan. Sept. 16, 2004).

The University of Minnesota Law School threatened to deny recognition to the CLS chapter because it required its voting members and officers to subscribe to a statement of faith. Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 675 (1996). Although it relented in response to a letter from a faculty member, the university subsequently denied another religious group recognition because it refused to state in its constitution that its membership was open to all students regardless of religion or sexual orientation. *Maranatha Christian Fellowship v. Regents of the Bd. of the Univ. of Minn. Sys.*, No. 03-5618 (D. Minn. Oct. 24, 2003). The university then changed its policy to allow religious student groups to "require their voting membership and officers to adhere to the organization's statement of faith and its rules of conduct." Student Unions & Activities, *Registration and Classification of Student Groups, in Student Unions & Activities Policy Handbook, available at* http://www.sao.umn.edu/groups/handbook/classification.php (last modified Apr. 15, 2008).

Even a law school that had a nondiscrimination policy that specifically exempted religious groups insisted that a CLS chapter pledge not to discriminate on the basis of religion. After suit was filed, the University of Toledo Law School reaffirmed its religious exemption and agreed that religious groups could cite to the Bible in their constitutions. *Christian Legal Soc'y Chapter of the Univ. of Toledo v. Johnson*, No. 05-7126 (N.D. Ohio Jun. 16, 2005).

In November 2008, relying on the district court decision in *Christian Legal Society v. Newton* and the *Truth* decision, a magistrate judge recommended that the district court deny a constitutional challenge to the University of Montana School of Law's derecognition of a CLS chapter because of its religious requirements for membership and leadership. *Christian Legal Soc'y v. Eck*, No. 07-154 (D. Mont. Nov. 14, 2008). The district court has not issued a final decision.

In the early 1990's, state universities began to enforce policies prohibiting discrimination on the basis of sexual orientation against student groups whose religious principles teach that "homosexual behavior [is] a sin that disqualifies those who practice it from membership or leadership within the group." Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994). Professor Bainbridge described the University of Illinois's derecognition of CLS when its student leaders "refused to sign a

University pledge to refrain from discrimination on the basis of sexual orientation." *Id.* at 370.

In a similar dispute, Arizona State University College of Law eventually conceded that CLS's practice did not constitute discrimination on the basis of sexual orientation and granted recognition to religious groups that limited voting membership and leadership to students sharing the same religious beliefs. *Christian Legal Soc'y Chapter at Ariz. State Univ. v. Crow,* No. 04-2572 (D. Ariz. Nov. 17, 2004).

Unfortunately, other student groups sometimes actively pressure a law school to deny CLS the same recognition they enjoy. For example, in 2003, a member of the Outlaw chapter at Ohio State University's Moritz College of Law filed a formal complaint demanding that the law school derecognize the CLS chapter because its officers and members signed a statement of faith agreeing, among other things, to comply with scriptural standards of sexual morality. *See* Jeff Polesovsky, *GLBT Group Files Formal Complaint Against CLS,* The Lantern, Nov. 18, 2003, *available at* http://www.thelantern.com/main.cfm?include=detail&storyid=560959 (last visited Apr. 9, 2009). When university officials threatened to withdraw recognition, CLS filed suit. *Christian Legal Soc'y Chapter of the Ohio State Univ. v. Holbrook,* No. 04-197 (S.D. Ohio 2004). In response, the university amended its policy to allow religious student groups to "adopt a nondiscrimination statement that is consistent" with their sincerely held religious beliefs. Ohio Union, Student Organization Registration

Guidelines, at 7, *available at* http://ohiounion.osu.edu/studentorgs/orgs_manage.asp#newreq (last visited Apr. 9, 2009).

Recently, the Iowa Campaign for Human Rights student group at the University of Iowa School of Law circulated a petition urging the university to deny funds to the CLS chapter. Adam Sullivan, *UI Christian Legal Society's Funding Under Fire*, Daily Iowan, Mar. 3, 2009, *available at* http://www.dailyiowan.com/2009/03/03/Metro/10365.html (last visited Apr. 30, 2009). On other occasions over the past six years, the university or the student government has threatened to penalize CLS.

CLS also has faced recognition issues at the law schools of Florida State University, the University of Oklahoma, the University of Pittsburgh, the University of New Mexico, the University of Idaho, and the University of South Carolina.

Several cases involving other student religious groups have reached federal court. In February 2009, relying on the Ninth Circuit's ruling in *Truth*, a district court held that California State University could deny recognition to four Christian organizations because they required members and officers to agree with the groups' religious viewpoints. *Every Nation Campus Ministries at San Diego State Univ. v. Achtenberg*, 597 F. Supp. 2d 1075 (S.D. Cal. 2009), *docketed on appeal sub nom. Alpha Delta Chi-Delta Chapter v. Reed*, No. 09-55299 (9th Cir. Feb. 27, 2009).

In a case currently pending in the Eleventh Circuit, the University of Florida denied recognition to Beta Upsilon Chi ("BYX"), a religious student organization, because it required voting members and officers to affirm its orthodox Christian viewpoint. Denying a preliminary injunction, the district court held that the university's denial of recognition did not violate BYX's rights of expressive association and free speech. *Beta Upsilon Chi, Upsilon Chapter at the Univ. of Fla. v. Machen,* 559 F. Supp. 2d 1274 (N.D. Fla. 2008). The Eleventh Circuit granted an injunction pending appeal and heard oral argument on December 10, 2008. *Machen,* No. 08-13332 (11th Cir. Jul. 30, 2008). (After argument, the university claimed to change its policy and filed a motion to dismiss the appeal as moot, which is pending.)

In 2007, a district court granted a preliminary injunction against the University of Wisconsin to prevent it from requiring a Catholic organization to include non-Catholics as members. *Univ. of Wis.-Madison Roman Catholic Found. v. Walsh,* No. 06-649, 2007 WL 1056772, at *4 (W.D. Wis. Apr. 4, 2007).

A district court granted a preliminary injunction against the University of North Carolina when it denied recognition to a Christian student organization because the group required its officers and members to agree with its religious viewpoints. *Alpha Iota Omega Christian Fraternity v. Moeser,* No. 04-765, 2005 WL 1720903, at *1 (M.D.N.C. Mar. 2, 2005). After the university adopted a new policy allowing all groups to "limit membership and

participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs," the case was dismissed as moot. *Alpha Iota Omega Christian Fraternity*, 2006 WL 1286186, at *3 (M.D.N.C. May 4, 2006).

Along the same lines, the Muslim Student Association at Louisiana State University was derecognized in 2003 after thirty years on that campus. LSU required all groups to place a nondiscrimination policy regarding religion and sexual orientation in the groups' constitutions, which the Muslim group refused to do because of its religious beliefs. Press Release, Foundation for Individual Rights in Education, Victory for Religious Freedom at Louisiana State University (Mar. 17, 2005), *available at* http://www.thefire.org/index.php/article/5436.html (last visited Apr. 30, 2009).

In addition to its lawsuit in the Eleventh Circuit against University of Florida, BYX was forced to litigate after the University of Georgia denied recognition on the ground that the Christian group required its officers and members to agree with its core religious viewpoints. *Beta Upsilon Chi v. Adams,* No. 06-104 (M.D. Ga. 2006). BYX has experienced recognition threats at Louisiana State University, Auburn University, and the University of Missouri.

ReJOYce in Jesus Campus Fellowship was threatened with denial of recognition by the Georgia Institute of Technology because the group required its voting members to affirm its statement of faith.

The Georgia Attorney General issued an opinion that the university's failure to recognize the religious student group violated its free speech rights. Ga. Op. Att'y Gen. 97-32 (1997). The group experienced a similar problem at the University of California, Berkeley.

DiscipleMakers Christian Fellowship was forced to file suit against Pennsylvania State University after university officials insisted that the group discriminated on the basis of religion in officer positions. In settlement, the university agreed to exempt religious groups from the nondiscrimination requirement. *DiscipleMakers v. Spanier,* No. 04-2229 (M.D. Pa. 2005).

The Christian Medical and Dental Association ("CMDA") chapter at the University of North Dakota was threatened with derecognition by the student government because CMDA requires its officers to share its religious viewpoints. CMDA also encountered problems at the College of Medicine and Dentistry of New Jersey and at Virginia Tech.

The conflict between the Ninth Circuit (*Truth* and *Newton*) and the Seventh Circuit (*Walker*) means that national religious organizations, including *amici* Christian Legal Society, Campus Crusade for Christ, and InterVarsity Christian Fellowship, cannot maintain uniform national membership criteria across their different campus chapters.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Petitioners,

v.

KENT SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE FELLOWSHIP OF CHRISTIAN ATHLETES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE [1]

Founded in 1954, the Fellowship of Christian Athletes ("FCA") is the largest Christian campus ministry in the world and the largest Christian sports organization in America. In the past year alone, FCA was on 7,125 campuses across the globe. FCA's campus ministry is led by student-athletes and coaches on middle school, high school, and college campuses. The programs of the campus ministry include club meetings, Bible studies, assembly programs, chapel programs, a drug free program, and an FCA membership program, called "Team FCA." While FCA campus meetings are open to anyone who possesses an interest in athletics, in order to be a member of Team FCA, an individual must sign the "Competitor's Creed," which declares that the person is a Christian and desires to live out the tenets of Christianity in the realm of athletics. Because FCA reserves its membership in Team FCA for adherents to the group's religious principles, FCA is deeply concerned about the crippling effect of the lower court's holding on the right to expressive association guaranteed by the First Amendment and the Equal Access Act.

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1. Counsel of record for the parties in this case have received timely notice of the intent to file this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

When the government controls the membership of expressive associations, it controls the message of those associations. That is the import of this case. The lower court allowed the school district to use its non-discrimination policy against religious students who were attempting to exercise their fundamental right to associate with others who held similar views. The school district allowed secular groups to reserve membership for adherents to the groups' core principles, but it denied a religious group the same opportunity. Thus it was the government—not the religious group—which engaged in viewpoint discrimination. In so doing, the school district violated the students' rights to expressive association, in contravention of the First Amendment and the Equal Access Act.

The lower court held that the school district's actions were appropriate because the court misapplied a free speech public forum analysis to an expressive association right, utilizing only a "reasonableness" test to determine the constitutionality of the school district's imposition on the membership of the student-initiated religious group. Thus the lower court created not only a Circuit split, but a conflict with decisions of this Court, which have required a strict scrutiny analysis of expressive association claims. Furthermore, the decision below will have a chilling effect on religious expression because it paves the way for state and local governments to exclude religious student groups—and, in fact, *all* religious organizations which reserve membership for adherents—

from limited public forums on the grounds that their membership criteria "discriminate" on the basis of religion. For these reasons, this Court should intervene and grant the petition for certiorari.

ARGUMENT

I. THE DECISION BELOW ALLOWS PUBLIC SCHOOLS TO ENGAGE IN VIEWPOINT DISCRIMINATION IN VIOLATION OF THE FREEDOM OF EXPRESSIVE ASSOCIATION PROTECTED BY THE FIRST AMENDMENT AND THE EQUAL ACCESS ACT.

A. The Freedom of Expressive Association Is a Fundamental Right Intimately Tied to Other First Amendment Freedoms and Possessed by All Citizens, Including Students in Public Schools.

This Court has declared the right of expressive association a fundamental right, recognizing the essential link between the most important of our individual liberties and the right to associate with others who hold similar views. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State

unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."). The fundamental nature of the right of expressive association has garnered it the highest level of protection. The right cannot be limited by the government unless the limitation serves a compelling government interest unrelated to the suppression of ideas, and the government interest cannot be furthered through means which are significantly less restrictive of the associational or expressive freedom. *Roberts*, 468 U.S. at 623.

Moreover, this essential right, like all fundamental rights guaranteed by the Constitution, is possessed by all persons, including students in state-operated schools. The law is clearly settled that students "do not shed their constitutional rights at the schoolhouse gate." *See generally Morse v. Frederick*, 127 S. Ct. 2618, 2621 (2007); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 844 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 349 (1985); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). One of the principal purposes of public schools is to train students to become valuable, contributory members of a democratic society. *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 265 (1990) ("'[P]ublic schools are vitally important in the preparation of individuals for participation as citizens, and as vehicles for inculcating fundamental values necessary to the maintenance of a democratic political system.'" (quoting *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (plurality)). Therefore, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

B. Expressive Association Is a Component of the Equal Access Act.

Congress recognized that students' rights to expressive association were so essential and so intricately tied to the freedom of religion that it included protections for expressive association in the Equal Access Act ("the Act"). The Act, which was passed in 1984 to protect the religious freedom rights of public secondary school students, makes it "unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a). Congress passed the Act in response to findings that there was widespread confusion among school administrators about the state of the law of religious liberty, a confusion which led many to ban student-initiated religious clubs. S. Rep. No. 98-357, at 11 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2348, 2357.

In the opinion below, the court upheld the decision of the Kent School District to deny Truth, a student-initiated Bible club, the right to associate for expressive purposes with those who held to the group's Christian ideals. *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 651 (9th Cir. 2008). The court held that membership criteria designed to protect the identity of the religious group did not fall within the Act's protection for the "content of the speech." *Id.* at 645. In limiting "content" to spoken words, the lower court did not appreciate the fact that

expressive association is intricately tied to the freedoms of speech and religion and is, in its own right, protected by the Act.

In fact, the legislative history of the Act plainly demonstrates that Congress intended to protect more than just religious speech. The first heading under the "Legal Authority" section of the Act's Senate Report reads, "Public School Students Have First Amendment Rights of Free Speech and Association." S. Rep. No. 98-357, at 21, 1984 U.S.C.C.A.N. 2367. Under that heading, the Report goes on to cite this Court's decision in *Widmar v. Vincent*, 454 U.S. 263, 269 (1981), noting that "[r]eligious discussion and worship are 'forms of speech and association protected by the First Amendment.'" S. Rep. No. 98-357, at 22, 1984 U.S.C.C.A.N. 2368. The Report essentially equates the rights of free speech and expressive association:

> Closely related to the right of free speech is the right of association. In *NAACP v. Alabama*, the Court held that the freedom to associate and debate ideas and beliefs is itself beyond debate. Since that time, numerous decisions have protected public school students' speech from classification based on subject matter.

S. Rep. No. 98-357, at 23, 1984 U.S.C.C.A.N. 2369. Clearly, the intent of Congress was to include the right of expressive association within the protections of the Act, safeguarding the right of religious students to freely associate with those who share similar views.

C. When a Religious Group Seeks to Protect Its Identity by Reserving Membership in the Group for Those Who Share the Group's Core Beliefs, This Is Not Invidious Discrimination, But Is the Essence of Expressive Association.

In holding that a school may apply its non-discrimination policy to bar religious groups from reserving membership for adherents, the lower court equated the application of membership criteria based on the ideology of the group with invidious discrimination. *Truth*, 542 F.3d at 644 ("States have the constitutional authority to enact legislation prohibiting invidious discrimination."). However, far from comprising invidious discrimination, the ability of a religious group to reserve membership for adherents simply is necessary to maintain the group's core values and religious mission. It is necessary for the same reason it was necessary for the EarthCorps at Kentridge High School to require its members to show "interest and dedication toward environmental issues" and for the Gay-Straight Alliance to require its members to be "willing to work towards the goals of the club" of "bringing GLBTQ [Gay, Lesbian, Bisexual, Transgendered, and Questioning] issues into the open, while working to decrease homophobia." *Truth*, 542 F.3d at 640. Forced inclusion of members who do not share a group's belief obviously dilutes the group's message and changes the identity of the group. In a thoughtfully written law review article, Joan Howarth underscores the problem with the lower court's reasoning. Dean Howarth writes:

> Few of us would spend much energy defending the right of a person who eats bacon for breakfast, burgers for lunch, and steak for

> dinner to become the President of the Vegetarian Society. Turning over the core values of the Vegetarian Society to meat-lovers could compromise its agenda beyond recognition. That, in short, explains why the First Amendment protects the right of expressive associations to exclude from membership and leadership those who do not support the core values of the association.

Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 892 (2009).

Protecting the group's ideological message through the use of membership criteria is "expressive activity that should be protected by First Amendment principles, not simplistically rejected with the label 'conduct.'" Howarth, *supra*, at 918. The primary purpose of the membership criteria is to promote the group's purposes, not to discriminate. It is because of this simple, yet vitally important, principle that religious organizations are routinely exempted from nearly all non-discrimination laws. *See, e.g.*, 42 U.S.C. § 2000e-1(a); Cal. Gov't Code § 12926(d); Wash. Rev. Code § 49.60.040(3). For example, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), this Court upheld the right of a Mormon religious entity to dismiss from employment an individual who was not a member of the Mormon Church. The religious entity in that case argued that it was protected by Section 702 of the Civil Rights Act, which exempts religious employers from Title VII's prohibition of religious discrimination

in employment. *Id.* at 331. This Court held that the exemption had a permissible legislative purpose to alleviate "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 339.

Along the same lines, government action which *mandates* the membership of a religious organization, strips the organization of its very identity and hinders its ability to carry out its religious mission. "'[T]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.'" *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 861 (7th Cir. 2006) (quoting *Roberts*, 468 U.S. at 623 (1984). While the lower court failed to recognize this, the justices who dissented to the denial of the rehearing en banc did. The dissenters noted that the majority concurrence failed to discuss the seminal case of *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981), in which this Court upheld the right of the Democratic National Convention to exclude delegates (to vote for the Democratic candidate) who were not publicly professed and registered Democrats. *Truth v. Kent Sch. Dist.*, 551 F.3d 850, 854 (9th Cir. 2008) (Bea, J., dissenting) (citing *Democratic Party*, 450 U.S. at 109). This Court noted, "[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party*, 450 U.S. at 122 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973)). Applying the reasoning of *Democratic Party*, the dissenters below argued, "A full opportunity for

professed Christians to participate in the direction of Club affairs is 'diluted' if members of other faiths—or persons without any religious faith—must have a voice in the group's expression." *Truth*, 551 F.3d at 854 (Bea, J., dissenting).

D. A School's Application of Its Non-Discrimination Policy to a Student Group's Membership Criteria Which Dilutes the Core Ideology of the Group Amounts to Viewpoint Discrimination in Violation of the Freedom of Expressive Association Protected by the First Amendment and the Equal Access Act.

When a school district uses its non-discrimination policy to control the membership of religious groups, but leaves secular groups untouched, it dilutes the message of the religious groups, while allowing the secular groups to retain their full identities. A government regulation which restricts only religious, and not secular, organizations is not neutral, but is viewpoint discrimination. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 831 (1995) (holding that University's denial of funding for religious student organization's newspaper on Establishment Clause grounds in public forum was impermissible viewpoint discrimination). At Kentridge High School, for example, thirty secular student organizations received official recognition from the school. Many of these organizations defined their membership criteria with respect to their core beliefs. Yet, Truth, a religious group, was denied this right. Forbidding a religious organization from establishing itself based on its belief *because the belief is religious* is viewpoint discrimination. *See* Howarth, *supra*, at 914.

The very purpose of non-discrimination policies is to provide equal rights to religious (and other protected) groups and to prevent against the societal harm that occurs when certain groups are granted most-favored status. But there is no societal harm when a religious group seeks to have its members identify with the group's beliefs, while keeping its meetings open to all. The harm occurs when the government enforces a non-discrimination policy *against* a religious group in such a way as to mandate who the group's members may be, while allowing non-religious groups to freely choose their members. This action takes the very policy that was designed to protect religion and, instead, makes it a weapon to squelch religion. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express."); *Truth*, 551 F.3d at 854 (Bea, J., dissenting) ("[T]he school district here 'at the very least' forces the Christian Bible study group to send a message that its agenda, discussions, and meetings can be framed, and their content determined, by non-Christians." (quoting *Dale*, 530 U.S. at 653)).

E. The Decision Below Targeting the Religious Viewpoints of Student Organizations Departs from This Court's Expressive Association Jurisprudence and Creates a Conflict Among the Circuits.

The lower court's decision allowing the school district to mandate the membership criteria of religious student groups "flies directly in the face of Supreme Court precedent," conflicting with this Court's decisions in *Boy Scouts v. Dale*, 530 U.S. 640 (2000), *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Democratic Party*, 450 U.S. 107 (1981), which all upheld the right of expressive associations to be free from government interference. *Truth*, 551 F.3d at 854 (Bea, J., dissenting). In addition, the decision has created a split with the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). In *Walker*, a case which "is on all fours" with *Truth*, 551 F.3d at 854 (Bea, J., dissenting), the Seventh Circuit held that a public law school's refusal to provide official recognition to the Christian Legal Society because the Society required members to sign a statement of faith violated the Society's expressive association rights. *Id.* Furthermore, the lower court's interpretation of student rights under the Equal Access Act is at odds with the Second Circuit's decision in *Hsu v. Roslyn Union Free School District No.* 3, 85 F.3d 839 (2d Cir. 1996), which concluded that Congress intended the Equal Access Act to protect the free association rights of religious students. Because of the vital nature of the expressive association right, the intervention of this Court is necessary to resolve the confusion which will result from the lower court's decision.

II. THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON ALL RELIGIOUS ORGANIZATIONS WHICH USE PUBLIC FACILITIES.

A. The Indication by the Lower Court That a Public School's Recognition of Student Organizations Within the School's Limited Public Forum Diminishes the Organizations' First Amendment Right of Expressive Association Is Constitutionally Flawed.

In the decision below, the lower court noted that Truth was seeking to associate as a "school-sponsored group." *Truth*, 542 F.3d at 648 (emphasis omitted). The court reasoned that, by electing to sponsor student groups, the school had created a limited public forum. *Id.* The court then applied this Court's limited public forum test, which provides that the government may not exclude speech in a limited public forum unless its reasons for doing so are "viewpoint neutral and 'reasonable in light of the purpose served by the forum.'" *Id.* at 649 (quoting *Rosenberger*, 515 U.S. at 829). Acknowledging that "'[v]iewpoint discrimination is . . . an egregious form of content discrimination,'" *id.*, the lower court nonetheless held that the school's non-discrimination policy was reasonable and viewpoint neutral because the restriction was not "based solely on the group's religious viewpoint." *Id.* at 649–50.

The fallacy in the lower court's analysis is that the limited public forum test applies to free speech claims, but governmental intrusion on an organization's membership implicates the organization's expressive

association right. "By applying the limited public forum test to the Club's right to decide who its members [would] be, the [lower court] lessened the scrutiny placed on restrictions of the right of expressive association."[2] *Truth*, 551 F.3d at 852 (Bea, J., dissenting). *Rosenberger's* "reasonableness" criterion is a significantly less stringent standard than this Court's strict scrutiny test for expressive association claims. *See Dale*, 530 U.S. at 648 (2000) (forbidding the government from restricting the right of expressive association unless the regulation serves "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms" (quoting *Roberts*, 468 U.S. at 623)); *see also NAACP v. Alabama*, 357 U.S. at 460–61 (1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

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2. Even if, *arguendo*, a limited public forum analysis were proper, an application of a school's non-discrimination policy that burdens a religious organization's right of association, while allowing non-religious organizations to exclude members based on the organizations' purposes is not viewpoint neutral. *See* Part I.D., *supra*.

B. The Lower Court's Improper Application of Public Forum Analysis to Expressive Association Rights Will Have a Chilling Effect, Not Just on Religious Student Groups, But on All Religious Organizations That Use Public Facilities.

1. By Eviscerating the Freedom of Expressive Association, the Decision Below Will Correspondingly Weaken Religious Freedom.

The importance of the expressive association right in a free society cannot be overstated. The right to associate freely with others who share similar ideas protects both individual liberties and the diversity of thought that is essential in a democratic society. *See NAACP v. Alabama*, 357 U.S. at 460 ("[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *Roberts*, 468 U.S. at 622 (noting that individual First Amendment freedoms "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed"); *Id.* ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."). Because the right of expressive association is inseparable from the individual fundamental liberties which form the foundation of a democratic society, weakening the right of association, as the lower court has done, necessarily weakens the fundamental freedoms tied to the right.

The deterioration of fundamental freedom, in particular religious freedom, was what Congress was trying to prevent when it passed the Equal Access Act, which in part protected the right of religious students to associate with others who shared their views. *See* Part I.B., *supra*. In the years leading up to the passage of the Act, confusion over the state of the law pertaining to the expression of religion in schools led school districts increasingly to treat religious students like second-class citizens. *See* S. Rep. No. 98-357, at 12–14, 1984 U.S.C.C.A.N. 2358–60. Despite the fact that school districts widely permitted extracurricular non-religious speech, many schools banned student-initiated extracurricular religious clubs, student newspaper articles on religious topics, religiously-themed student art, and even student community service activities, including a dance to benefit the American Cancer Society. S. Rep. No. 98-357, at 11–12, 1984 U.S.C.C.A.N. 2357–58. Schools refused to allow students to sit in groups of two or more and have religious conversations, forbade students from saying silent individual prayers before eating their lunches, and even prohibited students from praying together in a car on a school parking lot. *Id.* The first freedom protected in the Bill of Rights—religious freedom—had been nearly erased for students in our nation's schools. The Committee concluded that if, by passing the Act, "local authorities could take a truly neutral stance toward religious speech, students would lose the tragic perception that the government is affirmatively hostile to religious expression, a perception that could, in the next generation, lead to the national disaster of intolerance of religion." S. Rep. No. 98-357, at 21, 1984 U.S.C.C.A.N. 2367.

But now, twenty-five years later, the decision below has eviscerated the expressive association protections of the Equal Access Act and the First Amendment. This reversal of course will dilute, or eliminate altogether,[3] student religious expression, allowing the government to control religious speech through the imposition of membership requirements that will destroy the identity of religious groups. *See Truth*, 551 F.3d at 853 (Bea, J., dissenting) ("The School District told the Club that it could not be recognized because it required its members to comply 'in good faith with Christian character, Christian speech, Christian behavior, and Christian conduct as generally described in the Bible.' Thus, it was telling the Club how its expression must be determined." (citation omitted)).

Furthermore, the multiple conflicts in the law resulting from the lower court's decision once again will engender confusion among school authorities that will lead to the same type of hostility for religion that Congress was trying to avoid when it passed the Equal Access Act, a hostility which in the first instance had relegated student religious expression to the "secret and clandestine." S. Rep. No. 98-357, at 11, 1984 U.S.C.C.A.N. 2357. Even where open intolerance is not exhibited, a perception among students that the government is affirmatively hostile to religious expression will have a chilling effect on the right of expressive association of religious students, just as it did when Congress first passed the Act. In anticipation of receiving unfavorable treatment, religious students

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3. Now eight years after Petitioners attempted to form a Bible club at Kentridge High School, not one of the twenty-nine student groups at the school is a religious group.

may refrain from even seeking use of institutional facilities to preserve their rights of association. In either event, whether school authorities act out of overt hostility or out of confusion about the law, student-initiated religious groups will be prevented from carrying out their mission and conveying their message.

2. Student-Initiated Religious Groups Have a Vital Role to Play in Helping Adolescents Cope with the Many Pressures They Face.

Student-initiated religious groups have an important role to play in providing spiritual support for students facing the difficult issues of our time. Students in the nation's schools are dealing with drug abuse, violence, teen sex, and suicidal urges, not to mention stressful family situations, depression, and alienation. *See* S. Rep. No. 98-357, at 12, 1984 U.S.C.C.A.N. 2358. During the past decade, a vast body of research has demonstrated that religious practice promotes well-being in adolescents. For example, adolescents show lower rates of drug and alcohol abuse the more frequently they engage in religious activities. Patrick F. Fagan, *Why Religion Matters Even More: The Impact of Religious Practice on Social Stability*, No. 1992, Executive Summary Backgrounder (Heritage Foundation, Washington D.C.), Dec. 18, 2006, at 8, *available at* www.heritage.org/research/religion/bg1992.cfm (citing Marvin D. Free, Jr., *Religiosity, Religious Conservatism, Bonds to School, and Juvenile Delinquency Among Three Categories of Drug Users*, Vol. 15, No. 2, Deviant Behavior, at 151–70 (1994); Barbara R. Lorch & Robert H. Hughes, *Religion and Youth Substance Use*, Vol. 24, No. 3, Journal of Religion

and Health, at 197–208 (Sept. 1985); Byron R. Johnson, *A Better Kind of High: How Religious Commitment Reduces Drug Use Among Poor Urban Teens*, Report No. 2000-2, Manhattan Institute for Policy Research, Center for Research on Religion and Urban Civil Society (2001), *available at* www.manhattan-institute.org/html/cr_12.htm). The connection between increased religious practice and reduced drug use, in particular, is especially prevalent in adolescents living in the inner city. Fagan, *supra*, at 14 (citing Sung Joon Jang & Byron R. Johnson, *Neighborhood Disorder, Individual Religiosity, and Adolescent Use of Illicit Drugs: A Test of Multilevel Hypotheses*, Vol. 39, No. 1, Criminology, at 109–44 (Feb. 2001)). Furthermore, religious involvement has the same buffer effect against youth crime in these communities. Fagan, *supra*, at 15 (citing Lisa D. Pearce & Dana L. Haynie, *Intergenerational Religious Dynamics and Adolescent Delinquency*, Vol. 82, No. 4, Social Forces, at 1553–72 (June 2004).

Religious practice also has an inverse relationship with the level of teen sexual activity. Fagan, *supra*, at 7 (citing Lynn Blinn-Pike, *Why Abstinent Adolescents Report They Have Not Had Sex: Understanding Sexually Resilient Youth*, Vol. 48, No. 3, Family Relations, 295–301 (July 1999); John O.G. Billy, *Contextual Effects on the Sexual Behavior of Adolescent Women*, Vol. 56, No. 2, Journal of Marriage and Family, at 387–404 (May 1994)). In a 2002 review of the academic studies on the effects of religion, ninety-seven percent of the studies reported substantial correlations between increased religious involvement and a lower likelihood of promiscuous sexual behaviors. Fagan, *supra*, at 7 (citing Byron R. Johnson et al., *Objective Hope—Assessing the Effectiveness of Faith-Based*

Organizations: A Systematic Review of the Literature, 2002 Manhattan Institute for Policy Research, Center for Research on Religion and Urban Society, *available at* www.manhattan-institute.org/pdf/crrucs_objective_hope.pdf).

Finally, religious involvement corresponds to positive mental health in adolescents. Studies have shown that teens who have a high level of spiritual support from those in their community and who attend religious services are the least likely to suffer from depression. Fagan, *supra*, at 10 (citing Loyd S. Wright et al., *Church Attendance, Meaningfulness of Religion, and Depressive Symptomatology Among Adolescents*, Vol. 22, No. 5, Journal of Youth and Adolescence, at 559–68 (Oct. 1993)). In contrast, a lack of religiosity correlates with an increased risk of suicide. Fagan, *supra*, at 10 (citing Frank Tovato, *Domestic/Religious Individualism and Youth Suicide in Canada*, Vol. 24, No. 1, Family Perspective, at 69–81 (1990)). One explanation for this is that religious commitment and practice lead to increased self-esteem and social support. Fagan, *supra*, at 9–10 (citing Johnson et al., *Objective Hope*, *supra*). Indeed, one study of high-school students from West Virginia found that the "'ego strengths of hope, will, purpose, fidelity, love, and care' increased as the students lived out their religious beliefs more intently." Fagan, *supra*, at 10 (citing C.A. Markstrom, *Religious Involvement and Adolescent Psychosocial Development*, Vol. 22, No. 2, Journal of Adolescence, at 205–21 (Apr. 1999)).

The empirical evidence linking religious involvement to the increased well-being of adolescents bolsters the proposition that the government should protect the

expressive association rights of religious students. Schools should not ignore the spiritual dimensions of the problems that face adolescents. A student dealing with the pressures associated with drug or alcohol use, violence, teen sexuality, or depression, for example, ought to have the option of seeking spiritual guidance or support by attending a meeting of a student-initiated religious group of her choosing and hearing the message of that group, undiluted from the effects of a government mandate which forces the group to accept members which do not support the group's core beliefs.

3. The Decision Below Will Allow the Government to Exclude from Limited Public Forums All Religious Organizations Which Reserve Membership for Adherents.

Because the lower court applied public forum analysis to an expressive association claim, the import of the decision will be felt, not just by public school students, but by any religious or ideological organization which gathers in a limited public forum. For example, organized churches which currently meet during off-school hours for worship in schools across the country will be excluded from these limited public forums because their membership criteria "discriminate" on the basis of religion. This is not a stretch, but merely the logical implication of the decision below. In intruding on the students' rights to expressive association, the school district in this case relied not only on its own non-discrimination policy, which regulated "students in all aspects of the academic and activities program," it also relied on what the court held was the "relevant [state] non-discrimination law"—the regulation of unfair

practices in public accommodations. *Truth*, 542 F. 3d at 639–40 (citing Wash. Rev. Code § 49.60.215). Following the logic of the lower court, then, any state or local government which provides a limited public forum in which organizations are permitted to assemble will be able to rely on state or local anti-discrimination law to prevent religious organizations from selecting their members.

Lest anyone think that such a result is unlikely to occur in a country that has, throughout its history, offered many protections for religion, he or she need only examine the evidence of hostility toward religious organizations that is already exhibited by local governments across the country. For example, earlier this year, North Pointe Church in Binghamton, New York was denied the ability to rent a facility on the Broome Community College campus (part of the State University of New York system), despite the fact that the College had made its facilities open to the public for a wide array of expressive activity. Complaint at 6–8, *North Pointe Church v. Moppert*, No. 3:09-cv-00219-GTS-DEP (N.D.N.Y. filed Feb. 23, 2009). Almost immediately after the church filed suit, the College chose to change its policy to prevent *any group* from renting the school's facilities on weekends, rather than simply changing its position to protect the church's right of association. Jennifer Mesko, *College Won't Let Church—Or Anyone Else—Rent Space*, CitizenLink, Mar. 4, 2009, http://www.citizenlink.org/content/A000009531.cfm. In 2004, a school committee in Peabody, Massachusetts denied the Living Hope Church of the Nazarene the right to use a school facility under the same terms and conditions afforded other outside groups. Complaint at 4–9, *Living*

Hope Church of the Nazarene v. City of Peabody, No. 1:04-cv-12452-MLW (D. Mass. filed Nov. 19, 2004). In 2002, the City of Van, Texas made its community center available to a wide array of organizations, including the Kiwanis Club and groups meeting for family reunions and scouting events. Only religious groups were denied this opportunity. *Moore v. City of Van*, 238 F. Supp. 2d 837, 839 (E.D. Tex. 2003). The city's mayor stated that the center was "'not available for any type of religious service meetings.'" *Id.* at 840 (quoting Pls.' Ex. D). In 2001, South Coast Community Church in Marion, Massachusetts was denied after-hours access to school facilities, even though the school district had permitted its facilities to be used for a variety of purposes, including a YMCA after school day care program, scouting meetings, and city recreation department sporting events. Complaint at 3–7, *Taylor v. Marion Sch. Comm.*, No. 1:01-cv-11066-MLW (D. Mass. filed June 20, 2001). The school denied access to the church pursuant to its building use policy, which stated, "'[D]iscussions of subjects relating to religious doctrine must be barred.'" *Id.* at 5. In 2000, Kern County, California implemented a use policy for county buildings, which called for an "hourly usage fee" for "'religious activities such as a service, confirmation, first communion, etc.,'" even though activities such as "'youth activities, pot lucks, special events, etc.'" required no such fee to be paid. *ACLJ Files Religious Discrimination Lawsuit against California County after Church Charged Usage Fee*, Business Wire, Feb. 13, 2003, http://www.allbusiness.com/government/government-bodies-offices-regional-local/5709900-1.html (citing Complaint, *New Life Assembly v. Kern County*, No. 1:03-cv-05200-AWI-LJO (E.D. Cal. filed Feb.

13, 2003)). The New Life Assembly church sued the County after it was charged the usage fee, even though organizations such as Toastmasters, Lion's Club, Kiwanis Club, and Mexican-American Pioneers were permitted to use county facilities without paying the fee. *Id.* The decision below does nothing to discourage instances of religious discrimination such as these; rather, it merely provides another vehicle for religious intolerance.

As a result of the lower court's misapplication of public forum analysis to a religious organization's expressive association claim, many churches which provide significant benefits to their communities will be forced to choose between altering their very identities and not meeting at all. Thousands of churches across the country cannot afford to build facilities large enough to meet their needs, in which case their only option is to make use of a limited public forum, such as a school building or community center. Yet when the government conditions a church's ability to meet in a public facility on strict adherence to a non-discrimination requirement, despite the fact that churches routinely receive religious exemptions from such policies in other contexts, it forces the church to choose between diluting its core message and closing its doors. "[T]he choice between two unconstitutional choices is 'no choice at all.'" *Branch v. Smith*, 538 U.S. 254, 302 (2003) (quoting *New York v. United States*, 505 U.S. 144, 146 (1992)).

CONCLUSION

For the foregoing reasons, Truth's petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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TRUTH, AN UNINCORPORATED ASSOCIATION, *ET AL.*,
Petitioners,

v.

KENT SCHOOL DISTRICT, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 08-1130

TRUTH, AN UNINCORPORATED ASSOCIATION, *ET AL.*,
Petitioners,

v.

KENT SCHOOL DISTRICT, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the Foundation for Individual Rights in Education ("FIRE") submits this brief as *amicus curiae*[1] in support of Petitioners.

[1] Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party to this action authored any portion of this brief and that no person or entity, other than *Amicus*, made a

FIRE is a secular, nonpartisan civil liberties organization working to defend and sustain individual rights at our nation's colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity.

During its decade-long existence, FIRE has advocated for the fundamental religious liberties of campus religious organizations in multiple states and on multiple campuses. Because the Ninth Circuit's decision has already been cited as controlling precedent by both the Ninth Circuit (in a separate case) and a California district court in rulings denying associational rights to collegiate religious student groups, FIRE has a strong interest in securing a resolution of the present case that is consistent with this Court's jurisprudence and the nation's traditions regarding the fundamental importance of expressive association.

SUMMARY OF ARGUMENT

The fundamental question in this case is simple but profoundly important: Can religious student organizations participate in the life of public schools without being forced to give up their distinctive religious character? This Court has answered an emphatic "yes." In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), this Court held that religious groups were entitled to equal access to high school facilities. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court held that religious organizations were entitled to viewpoint-neutral access to university facilities. In both public high

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monetary contribution to the preparation or submission of this brief. Letters of consent from all parties to the filing of this brief have been submitted to the Clerk.

schools and colleges, religious groups are constitutionally entitled to equal access to academic facilities.

In recent years, however, public high schools, colleges and universities have created a new barrier to equal access: expansive nondiscrimination policies. In the instant case, Kentridge High School has conditioned access to its facilities on compliance with a nondiscrimination policy that prevents a religious student organization from functioning in a manner consistent with its principles. The school has taken the position that a religious student organization is not permitted to discriminate on the basis of *religion*. The organization cannot utilize the very principles that are *the reason for its existence* when making decisions on leadership, voting membership, and (because a group's statements come from its leaders and members) its message. This policy is akin to prohibiting an environmental group from asking whether prospective members or leaders actually have an interest in the environment or prohibiting the College Democrats from ensuring that its voting members are not Republicans. Kentridge's enforcement of its nondiscrimination policy ignores the critical difference between status and belief. Expressive organizations must be permitted to make *belief-based choices* when choosing their leaders and voting members. There is a difference between making a determination on the basis of an immutable characteristic and making a choice on the basis of changeable personal beliefs and rules of conduct.

Depriving religious student organizations of equal rights of speech and association simply because those organizations choose to govern themselves according to faith-based principles is fundamentally incompatible with this Court's precedents and unconstitution-

ally relegates religious students to second-class status. FIRE seeks to restore legal equality for students of all faiths or no faith at all.

REASONS FOR GRANTING THE WRIT

I. THE *TRUTH* DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT, DISREGARDS THE CORE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSIVE ASSOCIATION, AND CREATES A SPLIT IN THE CIRCUITS.

A. Freedom of Association Allows Groups to Choose Members and Leaders on the Basis of Belief.

Freedom of association is secured by the First Amendment.[2] It is a natural complement to freedom of expression because, as this Court has observed, "the right to speak is often exercised most effectively by combining one's voice with the voices of others." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006). This Court has recognized that choosing the terms of one's associations free from undue government interference is a "crucial" component of freedom of association because it protects against state coercion of "groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of America v. Dale*, 530 U.S. 640, 647–48 (2000). Correspondingly, "freedom of association plainly presupposes a freedom not to associate." *Roberts,* 468 U.S. at 623. Freedom of association

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[2] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (holding that "a corresponding right to associate with others in pursuit of a wide variety of...ends" is "implicit" in the First Amendment).

therefore grants an organization the right to make belief-based membership choices, including the choice to exclude from the organization people who do not share its core beliefs. Put another way, freedom of association at its core grants a right to "discriminate" on the basis of belief.[3]

B. The Ninth Circuit's Analysis Contradicts Supreme Court Precedent and Eviscerates Students' Right to Expressive Association.

In upholding Kentridge High's denial of official recognition to Truth, the Ninth Circuit construed the public high school's extracurricular program offering funding, access to facilities, and other benefits to a wide variety of student groups as a limited public forum. *Truth v. Kent School District*, 542 F.3d 634, 640 (9th Cir. 2008). It further held that the school's exclusion of a student group from that forum for refusing to abide by the school's nondiscrimination policy was permissible because such an exclusion need only be reasonable and viewpoint neutral. *Id.* at 649–50; *Truth v. Kent School District*, 551 F.3d 850, 850–51 (9th Cir. 2008) (concurring in denial of *en banc*). The Ninth Circuit's faulty analysis directly contradicts this Court's precedents and eviscerates students' right to expressive association.

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[3] Distinguishing "discrimination" on the basis of *belief* from invidious discrimination based on *status* is critical. Excluding individuals because of animus based on immutable characteristics like race does not follow from the right to form expressive organizations, because one's skin color does not define one's beliefs. However, the right to exclude people who do not share a common belief central to the group's purpose *is* fundamental to the right to expressive association.

First, the Ninth Circuit erroneously applied a reasonableness standard in evaluating Truth's denial of recognition. Concurring, two judges explained:

> [T]his case is not about the school's recognition of Truth as a school group, but the school creating Truth 'as a school-sponsored group.'... [T]he government is not required to subsidize expression, including expression through expressive association, within limited forums of its own creation as long as it restricts access to the forum according to reasonable, viewpoint-neutral rules.

Truth, 551 F.3d at 850–51 (internal citation omitted) (Fisher, J. and Wardlaw, J., concurring). Kentridge High's extracurricular program, which included 30 student groups in 2003, created a "forum for student and faculty expression." *Truth*, 542 F.3d at 640, 649 (quoting the program's constitution). Approved student groups adopted a wide variety of ideological perspectives, determined by the students outside of the classroom and during non-instructional time. *Id.* at 640–41. It is therefore not tenable to conclude, as the Ninth Circuit did, that the student groups' speech was partially the speech of the school.[4] The speech at issue here is readily distinguishable from the school-

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[4] The Ninth Circuit claimed its opinion was consistent with the Second Circuit's ruling in *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996), that student groups could restrict their group leadership to those endorsing the group's religious beliefs. *Truth*, 542 F.3d at 647. But the Second Circuit's holding in *Hsu* explicitly recognizes that the speech of student groups is the speech of the students, not the government, and as such does not violate the Establishment Clause. *Hsu*, 85 F.3d at 865–67 ("In short, the Establishment Clause does not bar the School from recognizing the Walking on Water Club and its leadership provision.").

sponsored speech in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). In *Hazelwood*, the speech in question—a student newspaper—was edited by the school and "disseminated under its auspices" as part of a faculty-run program "designed to teach" lessons in journalism. *Id.* at 272. As a result, this Court found that the newspaper in *Hazelwood* was speech that "members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271–72. In contrast, the public could not reasonably perceive the 30 different student groups funded by this program, expressing a wide variety of ideological views, as all "bear[ing] the imprimatur of the school."

Indeed, the Court has repeatedly held that a public school providing funds and other resources, such as empty classrooms, to a variety of student groups is not sufficient to transform student speech into school-sponsored speech. *See Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000) (student groups in a similarly structured program did not speak for the government); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 834 (1995) (with regard to a similarly structured program, the school is funding students' private speech); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (a similarly structured program "does not confer any imprimatur of state approval" on the messages expressed by student groups).

Because the speech at issue in *Truth* is private, the Ninth Circuit should have applied the strict scrutiny standard of review that governs school regulations on private speech. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969) (schools may regulate students' on-campus speech

only when it causes "disruption of or material interference with school activities"). Instead, the Ninth Circuit held that the school's exclusion policy was justified because it would "instill[] the value of nondiscrimination" in students. *Truth*, 542 F.3d at 649. Properly analyzed under strict scrutiny, however, this justification is clearly insufficient.[5] The school could not have prevented the *Tinker* students, for example, from wearing their anti-Vietnam armbands on school property in order to instill the value of patriotism. *Tinker*, 393 U.S. at 512–14.

In violation of this Court's precedent, the Ninth Circuit's holding in *Truth* means that schools may violate students' fundamental associational rights in order to teach "correct" values. This Court has repeatedly held that the state cannot interfere with expressive organizations' ability to form and to express their messages "for no better reason than promoting an approved message." *Dale*, 530 U.S. at 661 (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995)). The school here seeks to force Christian groups to accept avowed atheists, Muslim groups to accept Christians, and so forth, thus teaching students that religious student groups—unlike all other ideological student groups—do not enjoy the same right to expressive association as other groups dedicated to particular viewpoints.[6]

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[5] The *Tinker* Court stated that seeking to confine students "to the expression of those sentiments that are officially approved" is not a "constitutionally valid reason[] to regulate their speech." *Tinker*, 393 U.S. at 511.

[6] Indeed, the Ninth Circuit analogized banning Christian groups who only accept Christians to banning "a Student Pro-

This Court has made clear that the state's interest in preventing what public officials deem "discrimination" does not outweigh an organization's right to reject members who do not support its message. *See Dale*, 530 U.S. at 656–59. The school has chosen to fund a wide variety of private student speech. Having done so, it is precluded from requiring students to forego their right of expressive association as a condition of accessing those funds. Laws that "[make] group membership less attractive" by "withhold[ing] benefits... [raise] the same First Amendment concerns about affecting the group's ability to express its message" as the state engaging in direct regulation of group membership. *Rumsfeld*, 547 U.S. at 69.

Addressing a similar program to the one at issue here, this Court held in *Healy v. James*, 408 U.S. 169 (1971) that a public university cannot require a student group to forego its expressive association rights in order to receive school recognition. The Court stated in *Healy* that the fact that a student group maintains a "possible ability to exist outside the campus community" nevertheless "does not ameliorate" the unconstitutional burden placed on the student group by a denial of recognition. *Id.* at 183.

Further, even under the Ninth Circuit's misapplied reasonableness standard, the school's exclusion policy is unconstitutional because it is viewpoint discriminatory. The school has not claimed that all student groups must be open to all students. Instead, it has prohibited student groups from restricting group membership by the endorsement of only one particular belief system: religion. *Truth*, 542 F.3d at 639–40.

Drug Club that refused to obey the school's anti-drug policy." *Truth*, 542 F.3d at 650.

As the Ninth Circuit's opinion explicitly acknowledged, student groups may limit their membership to those who endorse the beliefs of feminists, patriarchs, liberals, conservatives, Thomas Hobbes, or the Sierra Club, but not to those who endorse a religion. *Id.* at 640–41. The fact that this unequal outcome comports with the school district's nondiscrimination policy speaks to the infirmity of that policy, not—as the Ninth Circuit held—to the legitimacy of the school's decision.

The forced inclusion of members who do not endorse the fundamental beliefs of a group severely interferes with a group's ability to form, develop and express its message. *Dale,* 530 U.S. at 654 (holding that requiring the Boy Scouts to accept a gay rights activist as an assistant scoutmaster would "surely interfere with the Boy Scout[s'] choice not to propound a point of view contrary to its beliefs.") With the benefits the school provides recognized student groups, students are able to develop and express any ideological viewpoint except a religious viewpoint. Liberal student groups can prevent conservative students from joining their group in order to develop and clearly express their liberal message. Conservatives may similarly reject liberals. Christian students, by contrast, must allow their message to be represented by those hostile to the basic beliefs around which the group was formed.

A policy allowing student groups to limit their membership to those with any ideological viewpoint except a religious one uniquely interferes with the development and expression of a religious viewpoint. Court precedent leaves no doubt that religion qualifies as a viewpoint. *Rosenberger*, 515 U.S. at 831 (stating that religion provides "a standpoint from

which a variety of subjects may be discussed and considered" and thus is a viewpoint). The Ninth Circuit is thus incorrect in claiming that the school's exclusion policy is viewpoint neutral.

C. The Ninth Circuit's Decision Creates a Split With the Seventh Circuit Over the Appropriate Standard of Analysis for Freedom of Expressive Association Claims in Student Group Cases.

This Court provided specific guidance in *Dale* for evaluating claims of undue government interference with expressive association: The government must prove its regulation furthers "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623). By ignoring *Dale*'s clear analytical framework and failing to subject the District's restriction to strict scrutiny, the Ninth Circuit is flatly at odds with a parallel case in the Seventh Circuit.

Despite Truth's expressive association claim, the Ninth Circuit's decision failed to impose *Dale*'s strict scrutiny requirement. Instead, as the dissent notes, the Ninth Circuit mistakenly applied "a *Rosenberger* 'free speech' analysis (when the content of the speech is known and is outside a reasonably set topic area) to what is a *Dale* 'freedom of association' case (which deals with the formulation of the content of such speech)." *Truth*, 551 F.3d at 853 (Bea, J., dissenting). *Dale* indeed is controlling and compels a different result. As in *Dale*, the government action at issue here forces Truth to fundamentally alter its expressive message and allows the District to "impos[e] its views

on groups that would rather express other, perhaps unpopular, ideas." *Dale*, 530 U.S. at 647–48. As in *Dale*, the government action here would "force the organization to send a message"—namely, that behaviors or beliefs patently inconsistent with Truth's mission are nevertheless unobjectionable. *Id.* at 653. This Court has held that a government actor cannot compel indirectly a result that it is constitutionally prohibited from achieving directly. *Healy*, 408 U.S. at 183. By permitting the District to require Truth to change its organizational message in order to gain official recognition and the attendant benefits, the Ninth Circuit has allowed precisely such unconstitutional government compulsion.

Instead of following *Dale*, the majority largely ignored the student group's core expressive association claim, deciding that the District's nondiscrimination policy is an acceptable instance of a "viewpoint neutral" and "reasonable" forum requirement. *Truth*, 542 F.3d at 651 (Fisher, J. and Wardlaw, J., concurring). In the majority opinion, *Rosenberger*'s forum analysis test—which looks only to the "reasonableness" of the restriction on speech—is allowed to subsume the First Amendment's distinct protection of expressive association, swallowing Truth's expressive association claim whole. As a result, the state is able to infringe upon freedom of association without being required to withstand strict judicial scrutiny. By trivializing Truth's expressive association claim, the Ninth Circuit's opinion renders freedom of association an empty right.

The Ninth Circuit's treatment of a student group's expressive association claim is at odds with the Seventh Circuit's decision in *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). The facts in

Walker are analogous to those in *Truth*.[7] In *Walker*, Southern Illinois University School of Law, a public law school, cited a violation of school nondiscrimination policy to deny recognition to a Christian student group because the group's membership requirements excluded individuals who engaged in homosexual conduct.[8]

Unlike the Ninth Circuit in *Truth*, however, the Seventh Circuit recognized the facts in *Walker* as presenting a "'forced inclusion' case," as in *Dale* and *Hurley*.[9] Accordingly, the Seventh Circuit applied the *Dale* standard, holding that "[i]nfringements on expressive association are subject to strict scrutiny." *Walker*, 453 F.3d at 861. Finding that "CLS's beliefs about sexual morality are among its defining values," the Seventh Circuit concluded that "forcing [CLS] to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist." *Id.* Compelled by this Court's holdings in *Dale*, *Healy*, and *Hurley*, the Seventh Circuit issued a preliminary in-

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[7] In dissenting from the Ninth Circuit's denial of rehearing *en banc*, Judge Bea classified *Walker* as being "on all fours with our case" and characterized the majority concurrence as "clearly establish[ing] a circuit conflict." 551 F.3d at 857.

[8] While expecting members to refrain from engaging in homosexual conduct, the Christian Legal Society accepted officers and members who had engaged in homosexual conduct in the past or who had homosexual inclinations but did not engage in or affirm homosexual conduct. *Walker*, 453 F.3d at 858. CLS's disapproval of homosexual conduct is one of several moral strictures promulgated by the group, which also prohibits fornication and adultery.

[9] *Walker*, 453 F.3d at 864. Furthermore, the Seventh Circuit characterized the question presented by *Walker* as "legally indistinguishable from *Healy*." *Id.*

junction against Southern Illinois University, prohibiting the school from denying recognition to CLS. Critically, the Seventh Circuit distinguished the student group's expressive association claim from a concordant free speech claim, addressing each in separate sections of the opinion. This approach allowed each distinct First Amendment claim to be considered discretely, with the proper scrutiny, and in the correct analytical framework.

In sharp contrast, rather than accord expressive association a distinct analysis befitting its importance (and demanded by precedent), the Ninth Circuit reduces expressive association to "simply another way of speaking," indistinct from other speech claims. *Truth*, 542 F.3d at 652 (Fisher, J. and Wardlaw, J., concurring). In doing so, it robs expressive association of its unique value as "a correlative freedom" to other First Amendment protections, "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts*, 468 U.S. at 622. The Ninth Circuit uses this reduction to justify "apply[ing] the lesser standard of scrutiny, even if the same burden on a group's rights outside a limited public forum would be subject to strict scrutiny." *Truth*, 542 F.3d at 652 (Fisher, J. and Wardlaw, J., concurring). But the concurrence ignores the fact that this Court applied a different and stricter analysis in *Healy*, despite the fact that *Healy*, like *Truth*, involved access to a "forum" created by a public school. Further, as Petitioners note, the Ninth Circuit's prior decision in *Truth*, later withdrawn, analyzed Truth's expressive association claims independently of forum analysis, relying on this Court's expressive association holdings. Pet'rs' Br. at 22 n.12, citing *Truth v.*

Kent School District, 499 F.3d 999 (9th Cir. 2007) (withdrawn).

Because the proper framework for analyzing the right to expressive association is in doubt as a result of conflicting analyses employed by the circuits, this Court should grant Truth's petition.

II. IF ALLOWED TO STAND, *TRUTH* WILL ERODE THE FIRST AMENDMENT EXPRESSIVE ASSOCIATION RIGHTS OF STUDENTS AT PUBLIC COLLEGES ACROSS THE COUNTRY.

A. Decisions Restricting Freedom of Speech and Association at the High School Level Threaten Those Rights at the College Level.

Traditionally, this Court has afforded robust protection to the expressive rights of students at public colleges and universities and has, by contrast, given primary and secondary schools greater leeway to regulate student speech. In case law spanning decades, the Court has declared the public university campus to be "peculiarly the 'marketplace of ideas'"[10] and has written that the university carries a "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[11] The Court has recognized that "[u]niversity students are, of course, young adults. They are less impressionable than younger students ... " *Widmar*, 454 U.S. at 274 n.14.

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[10] *Healy*, 408 U.S. at 180 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

[11] *Rosenberger*, 515 U.S. at 835.

In spite of the obvious differences between the high school and college settings, federal circuit courts have occasionally conflated the standards governing regulation of student speech in each arena. As a result of this confusion, decisions restricting speech and association at the high school level threaten those rights at the university level as well.

The Tenth Circuit, facing an acting student's refusal to use certain expletives during an in-class acting exercise, held that this speech was "school-sponsored" and therefore was governed by *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988). *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004). *Hazelwood* stated that high school administrators may regulate the content of school-sponsored student publications "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 at 273. The Tenth Circuit similarly applied *Hazelwood*'s analysis to a university's decision to prevent a student group from showing a film deemed by administrators to be too controversial. After finding that the student group was an organ of the school, the Tenth Circuit held that *Hazelwood* governed the university's ability to regulate its speech. *Cummins v. Campbell*, 44 F.3d 847, 853 (10th Cir. 1994).

The Seventh Circuit applied the *Hazelwood* framework to university censorship of a student newspaper in *Hosty v. Carter*, 412 F.3d 731, 734 (7th Cir. 2005) (declaring "*Hazelwood* provides our starting point."). In response to plaintiffs' objection to applying *Hazelwood*'s high school standard to a college newspaper, the court wrote that "[T]here is no sharp difference between high school and college papers." *Id.* at 734–35.

The Eleventh Circuit even applied standards governing high school speech to university regulations restricting the time and place for distributing student government campaign literature and election-related debates. *Alabama Student Party v. Student Government Association of University of Alabama*, 867 F.2d 1344 (11th Cir. 1989). Despite the fact that the regulations intruded upon the core political speech of university students, the Eleventh Circuit pronounced that because the University of Alabama "is a university, whose primary purpose is *education*...Constitutional protections must be analyzed with due regard to that educational purpose..." *Alabama Student Party*, 867 F.2d at 1346. The court added that, like the student newspaper in *Hazelwood*, student elections should be considered a "learning laboratory," subject to "reasonable restrictions." *Id.* at 1347.

Rulings concerning students' speech rights in the secondary school context have negatively impacted students' speech rights in higher education. Therefore, the Ninth Circuit's decision in *Truth* will inevitably deprive college and university students of First Amendment rights.

B. The Ninth Circuit and Lower Courts Have Already Relied on *Truth* to Deny Associational Rights to Religious College Student Groups.

The Ninth Circuit's holding in *Truth* has already negatively impacted expressive association on college campuses. Despite the fact that *Truth* arose in the high school context, the Ninth Circuit subsequently applied its decision and reasoning to the university setting. *See Christian Legal Society Chapter of University of California v. Kane*, No. 06-15956 (9th Cir. Mar. 17, 2009).

In *Kane*, a religious student group at the University of California at Hastings Law School challenged the school's nondiscrimination policy, which required all student groups to "accept all comers as voting members even if those individuals disagree with the mission of the group." *Kane*, No. 06-15956. The student group was denied official recognition because it required all voting members and officers to agree to a Statement of Faith. In a one-paragraph opinion, the Ninth Circuit upheld the law school's nondiscrimination requirement as "viewpoint neutral and reasonable," citing *Truth* as controlling precedent. *Id.*

Anticipating *Kane*, a district court in the Ninth Circuit applied the *Truth* decision to other religious college student groups. *Every Nation Campus Ministries v. Achtenberg*, 2009 U.S. Dist. LEXIS 12251 (S.D. Cal. Feb. 6, 2009). Relying almost exclusively on *Truth*, the district court denied four religious groups at two California State University system schools the right to choose their members or leaders by reference to religious beliefs. *Id.* Repeating *Truth*'s mistaken application of forum analysis, the district court held that "CSU may restrict access to its recognized student organization forum so long as the restrictions are viewpoint-neutral and reasonable in light of the purposes served." *Id.* at *48–49. Having determined that CSU's regulations were viewpoint-neutral and reasonable, following *Truth*, the court concluded that "CSU's nondiscrimination policy burdens Plaintiffs' expressive activity, if at all, only incidentally." *Id.* at *55.

Truth's holding has already negatively affected student rights in the university setting. If allowed to stand, the *Truth* decision will deprive secondary school

and collegiate student groups of their associational rights.

C. Student Groups at Our Nation's Public Colleges Have a Fundamental Right to Specify Terms of Membership Based on Shared Beliefs.

The First Amendment's protections fully extend to the public university campus.[12] This extension encompasses freedom of association since "implicit in the right to engage in activities protected by the First Amendment" is a "corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622.

This Court has previously affirmed the importance of students' associational rights in the university setting. In *Healy v. James*, the Court invalidated a university's decision to deny official recognition to a student group because of concerns over potential disruption of campus activities. Stating that "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [their] associational right," the Court held that "a 'heavy burden' rests on the college to demonstrate the appropriateness" of its action. *Healy*, 408 U.S. at 181, 184. In *Widmar v. Vincent*, the Court held that by denying a religious student group the use of campus facilities for meetings, a university violated the group's right to free exercise of religion

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[12] *See, e.g., Healy*, 408 U.S. at 180 ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

and freedom of speech and association. *Widmar*, 454 U.S. at 269. Because denying the group recognition impacted "forms of speech and association protected by the First Amendment," the university had to demonstrate that such a denial was "necessary to serve a compelling state interest and...narrowly drawn to achieve that end," and it was unable to do so. *Id.* at 270.

That student groups at public colleges and universities have the same right as other private expressive organizations to limit membership based on shared beliefs was recognized by the Seventh Circuit in *Christian Legal Society v. Walker*. There, the Seventh Circuit granted a student group's request for a preliminary injunction against a law school's revocation of the group's official status, which the school had justified on the basis that the group required voting members and officers to affirm a statement of faith denouncing homosexual conduct, in violation of the university's nondiscrimination policies. *Walker*, 453 F.3d at 858.

In granting the injunction, the Seventh Circuit held that forced inclusion would violate the group's expressive associational rights, for "[i]t would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct." *Id.* at 863. Finding that the law school did not demonstrate a compelling state interest sufficient to justify its interference with the group's associational rights, the Seventh Circuit issued a preliminary injunction ordering the group's official status to be restored. *Id.* at 867. The Ninth Circuit's ruling in *Truth* contravenes the well-established Court jurisprudence that *Walker* upholds.

D. Religious Student Groups are Frequently Denied Official Recognition by Public Colleges and Universities in Violation of their First Amendment Right to Freedom of Association.

At public colleges and universities across the country, religious student groups are forced to choose between abandoning their core religious beliefs to gain official recognition and its attendant benefits,[13] or preserving their associational identity at the cost of being denied equal access to school resources enjoyed by similarly motivated—but secular—groups. Unsurprisingly, religious organizations recruit and choose leaders and voting members using faith-based criteria. Forcing religious student groups to choose leaders and members without reference to faith-based criteria thwarts the groups' central purpose—namely, to provide students the ability to associate with people of their faith.

Despite the understandable and constitutionally protected desire of religious students to join and maintain campus groups centered upon shared faith, *amicus* FIRE has seen a trend toward denial of recognition of religious college student groups in recent years.[14] In response, students have filed federal civil

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[13] The benefits of official recognition are often vital to the very existence of an organization on campus. Frequently, "unrecognized" campus organizations are not allowed to meet anywhere on campus, may not be referenced by name in any printed materials on campus, and are subject to similar requirements that impact their ability to exist as organizations.

[14] *See, e.g.*, Andrea Billups, *Student Group Can Use 'God' in Creed*, The Washington Times, March 30, 2001; *Christian Student Group Sues Rutgers after University Revoked its Charter*, The Chronicle of Higher Education, Jan. 10, 2003; John Leo,

rights lawsuits against numerous public universities, including Southern Illinois University–Carbondale, the University of Minnesota, Rutgers University, The Ohio State University, Pennsylvania State University, the University of North Carolina at Chapel Hill, Arizona State University, Southwest Missouri State University, the University of Oklahoma, the University of Florida, and the aforementioned suit against the University of California at Hastings College of the Law. Several have resulted in out-of-court settlements and university policy changes—specifically, at the University of Minnesota, Rutgers, Ohio State, Penn State, Southwest Missouri State, Arizona State, and the University of Oklahoma. Others, at Southern Illinois University and the University of North Carolina, were resolved in favor of the religious student groups by court order or decision.[15] Finally, a decision from the United States Court of Appeals for the Eleventh Circuit is pending in *Beta Upsilon Chi v. Machen*, 559 F. Supp. 2d 1274 (N.D. Fla. 2008), a case in which a Christian fraternity brought suit against the University of Florida after being denied recognition as a registered student organization because the fraternity requires its members to be Christian.

Not all disputes result in litigation, but the many incidents that FIRE has seen speak volumes about

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Playing the Bias Card, U.S. News & World Report, Jan. 13, 2003; *UNC Affirms Christian Group; UNC-CH Says Christian Group Can Remain Official Organization*, The Associated Press State & Local Wire, Dec. 31, 2002.

[15] *See Walker*, 453 F.3d 853 (7th Cir. 2006); *Alpha Iota Omega Christian Fraternity v. Moeser*, Civ. No. 1:04CV00765 (M.D.N.C. May 4, 2006) (dismissing plaintiffs' complaint as moot after voluntary revision of university non-discrimination policy).

the size of this unconstitutional trend. At numerous other public colleges, Christian or Muslim student organizations have faced sanctions for refusing to comply with nondiscrimination policies or similar requirements. Without ending up in court, controversies have roiled public campuses, including California State University – San Bernardino, Louisiana State University, Purdue University, Castleton State College in Vermont, the University of Arizona, the University of Wisconsin at Madison, the University of Wisconsin at Eau Claire, and Wright State University.

E. If the Circuit Split Regarding the Analysis of Expressive Association Claims Is Not Resolved Properly, the Exclusion of Religious Student Groups From Our Nation's Public Colleges Will Grow Far Worse.

A split exists among the circuits over the analytical framework for evaluating government infringement of expressive association rights. Allowing this conflict to go unremedied will dramatically increase the burgeoning incidence of hostile exclusion experienced by religious student groups on public campuses.

In the few months since the Ninth Circuit's ruling in *Truth*, it has already been cited as justification for denying recognition to several religious student groups in California. As a result of *Truth*, all religious student groups wishing to limit their voting membership and leadership to those who share the group's tenets of faith are at risk of derecognition. FIRE's decade of experience has taught us that university administrators are keenly aware of discre-

pancies or unresolved questions in the law,[16] so we are sadly confident that if *Truth* and its progeny are allowed to stand, universities in all circuits will be emboldened to force student religious groups off campus and out of what this Court has deemed "peculiarly the 'marketplace of ideas.'" *Healy*, 408 U.S. at 180 (internal citation omitted). Depriving religious organizations of an equal right to associate on public university campuses simply because those organizations choose to govern themselves according to faith-based principles is fundamentally incompatible with the marketplace of ideas and relegates religious students to an unconstitutional second-class status. The circuit split demands resolution to preserve doctrinal clarity regarding the fundamental right of student groups to determine their associative message. Simply put, this Court must act to preserve freedom of association on campus.

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[16] For example, one week after the Seventh Circuit's decision in *Hosty v. Carter*, holding that public colleges can regulate the content in student newspapers in a manner akin to high schools, the general counsel for the California State University system penned a memorandum to CSU college presidents stating that the decision "appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers." Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), *available at* http://www.splc.org/csu/memo.pdf.

CONCLUSION

For all of the reasons stated above, we ask that the Supreme Court grant the writ of certiorari.

Respectfully submitted,

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Supreme Court of the United States

TRUTH, AN UNINCORPORATED ASSOCIATION, ET AL.,

Petitioners,

v.

KENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF STAND TRUE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

Stand True is a national Christ-centered campus ministry that is committed to providing its members, who include high school students, with a forum to grow in their expression, understanding, and acceptance of the Christian faith.[1] Stand True is concerned that the Ninth Circuit's ruling will require its members to alter and modify their policies, membership requirements, and speech or face exclusion from high school campuses.

Stand True offers a nationwide perspective that is not available to a single, local group like Truth. Stand True discusses the confusion imposed by the conflicting decisions of the Second and Ninth Circuits. It speaks to the imposition on and curtailment of speech engendered by rules that restrict the ability to impose membership requirements. Stand True addresses the Equal Access Act's intended application to expressive associations and the consequences to student groups that arise if the Act is denied its full

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[1] Pursuant to Supreme Court Rule 37.6, the *Amicus* submitting this brief and its counsel represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *Amicus* paid for or made a monetary contribution toward the preparation and submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file, and consented to this brief being filed. The letters of consent dated March 31, 2009 and April 7, 2009 are on file with the Clerk of Court in accordance with Supreme Court Rule 37.3(a).

reach. These matters are relevant to the Court's decision to grant Truth's Petition and will not be fully addressed by the parties.

I. SUMMARY OF ARGUMENT

Twenty-five years ago, Congress promised high school students that their right to associate—whether to discuss Plato, debate the costs and benefits of socialism, or explore the place of religion in their lives—would be protected from content-based discrimination by school officials unless necessary to ensure school discipline and well-being. Congress made this promise in the Equal Access Act ("EAA"), 20 U.S.C. §§ 4071-4074 (1984), making it illegal for high schools that offered their space to students "to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a).

Regrettably, this promise has gone unfulfilled for generations of high school students, and it has been made illusory by the decision of the Ninth Circuit. Although other student groups are given the right to define their membership, religious groups in the Ninth and Second Circuits—the only courts to have considered the issue—cannot. In the Ninth Circuit, a religious group, even if open to all, is not allowed to ask that its voting members agree to the tenets that

define the purpose and the nature of the group. In the Second Circuit, that right is limited; a court is allowed to determine, based on its own views, what membership criteria are appropriate. *See Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996).

The promise of the EAA has been denied in another respect. Congress enacted the EAA to clarify the rights of high school students. It did not intend for high school students to be caught up in years of litigation while school officials and courts wrangled over the meaning of the EAA. However, except for the narrow agreement that some form of restriction can be imposed, the Ninth and Second Circuit decisions conflict, leaving schools and courts with no single standard.

The courts conflict on the meaning of "content of the speech," as that phrase is used in the EAA. The Ninth Circuit considers membership selection not to be speech at all, but to be conduct that a school can regulate without fear of violating the EAA. In contrast, the court in *Hsu* concluded that, as to certain officers, membership requirements could be imposed as an essential component of the content of the speech of the religious group. The Second Circuit recognized that membership criteria defines and dictates the content of the speech of a group.

Likewise, the courts are at loggerheads as to the meaning of "equal access" and "discrimination." The Ninth Circuit holds that the right to determine

group membership must give way to a "neutral" non-discrimination policy. But unlike Respondents' Key Club and National Honor Society that can discriminate against those who are not of "'good character,'" App. 11a-12a, or the EarthCorps that can insist that its members meet the criteria of "interest and dedication toward environmental issues," App. 11a, or the Gay-Straight Alliance that can ask its members to commit to "'fight[ing] heterosexism and other forms of oppression,'" *id.* (alteration in original), a religious group in the Kent School District cannot ask that its voting members share the views of the group. The "neutral" policy denies equal access and discriminates against Petitioners based on their religious views and the content of their speech.

The Second Circuit agrees. The "equal access" requirement of the EAA is not met simply because a policy is applied "neutrally." Such a policy discriminates against religious groups. It denies them the same rights to associate—to include *and* to exclude based on the group's expressed beliefs—that are extended to non-religious groups.

For these reasons, a grant of certiorari is warranted. There is both an intractable conflict and a need for a single, uniform interpretation of the EAA. Students, such as Petitioners, should not have to spend their four years of high school fighting for recognition under a statute that was intended to secure and clarify their rights.

II. ARGUMENT

Amicus acknowledges that there are reasons independent of the EAA that justify the grant of the Petition. Focusing solely on the EAA, there are three reasons to grant Petitioners' writ.

First, there is a clear, irreconcilable conflict between the Second and Ninth Circuits. The Ninth Circuit disavows a conflict, but one exists in three respects: a) in contrast to the Second Circuit, the Ninth Circuit concluded that the term "content of the speech" as used in the EAA is not implicated by a non-discrimination policy; b) again in contrast to the Second Circuit, the Ninth Circuit concluded that there is no discrimination and "equal access" is assured when a policy simply applies to all groups, regardless of its differing impact; and c) the Ninth Circuit failed to question whether a non-discrimination policy as applied to Petitioners or any similar group is necessary to school discipline and student well-being justifying Respondents' refusal to recognize Petitioners as a student group. *See infra* Section II.A.

Second, there is clearly a need for a single, uniform interpretation of the EAA. Under the present system, both school officials and courts do not have answers (or they have competing answers) to the questions of how much deference should be afforded to a student group's membership criteria, the extent to which a school's decision to recognize a student group is guided by the EAA, specifically sections

4071(c)(4) and 4071(f), and how much a court may impose its own sense of what is proper. *See infra* Section II.B.

Finally, whether because of self-editing, the short period of time students attend high school, and/or the natural inclination of students to conform, the issue of whether a school's non-discrimination policy justifies the decision in this case rarely arises. *Amicus* knows of only two cases, *Hsu* and Petitioners', that have dealt with this issue. The conflict noted here and by Petitioners has been 12 years in the making. Generations of high school students have been without the full protections afforded by the EAA. Those in the Ninth Circuit now face a bleaker future. *See infra* Section II.C.

A. The Ninth Circuit's Interpretation of the Equal Access Act Conflicts with That of the Second Circuit in Three Respects.

The Ninth Circuit insists that there is no conflict between its decision and *Hsu*, noting "[o]ur decision is not inconsistent with that of the Second Circuit." App. 27a. However, *Hsu* and this case present the same essential facts with two very different outcomes.

Both cases involve high school religious groups that sought to gather in order to "praise God" in "Christian fellow-ship," *Hsu*, 85 F.3d at 849, and "grow in a relationship with Jesus Christ." App. 7a. Both groups welcomed all high school students to

attend meetings and events, but imposed certain membership restrictions designed to ensure that the content of the groups' meetings would be consistent with the groups' religious beliefs. App. 7a-8a; *Hsu*, 85 F.3d at 849. In *Hsu*, the group required that its officers "be 'professed Christians either through baptism of confirmation'" so that the group would "'serve the function we desire for it to serve.'" *Hsu*, 85 F.3d at 849, 851. In this case, the group sought to impose a restriction on its membership. Those who professed to accept Christian beliefs could be full voting members. Those who did not were allowed to attend meetings, but not vote. Only voting members could select or serve as officers. App. 7a-8a. Both cases involved application of non-discrimination policies that prohibited discrimination on the basis of "creed" and "religion." App. 9a-11a; *Hsu*, 85 F.3d at 850. Finally, both involved a school's decision to deny official recognition of the religious group.

Faced with the same challenge under the same statute—the EAA—the courts reached irreconcilably different conclusions as to the meaning of "content of the speech," as to the meaning of "equal access" and "discrimination," and as to the weight to give the school's interest in enforcement of a non-discrimination policy.

1. Definition of "Content of the Speech."

In *Hsu*, the Second Circuit drew heavily on this Court's First Amendment jurisprudence to define the

phrase "content of the speech" as used in the EAA. 85 F.3d at 856-59. Drawing from cases like *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), the Second Circuit recognized that the religious group sought to control its membership in an effort to define and protect the content of its speech. *See Hsu*, 85 F.3d at 856-59. The Second Circuit acknowledged this Court's consistent message that "a regulation that prevents a group from excluding certain people 'may impair the ability of the original members *to express only those views* that brought them together.'" *Id.* at 859 (quoting *Roberts*, 468 U.S. at 623); *see also, e.g., id.* at 856 ("[T]he message a group imparts sometimes depends upon its ability to exclude certain people. . . ."). The court then concluded that the membership requirements were protected as speech under the EAA. "As in *Hurley*, the Club's decision to exclude is based on its desire to preserve the content of its message." *Id.* at 857.

In contrast stands the Ninth Circuit's decision. Except in its special concurrence, App. 35a-38a, the court makes no reference to the right of groups to determine their membership. It does not discuss, or even mention, the fact that there is a correlation between the composition of a group and the content of its speech. *Roberts, supra*, is only cited for the proposition that states are empowered "to enact legislation prohibiting invidious discrimination." App. 21a.

Instead, the Ninth Circuit's analysis turns entirely on the idea that group selection is conduct that can be regulated.[2] It distinguishes *Widmar v. Vincent*, 454 U.S. 263 (1981), which it recognizes was the inspiration for the EAA, on the grounds that the right to exclude a group is properly exercised when a group's "'*activities* . . . violate reasonable campus rules.'" App. 24a (quoting *Widmar*, 454 U.S. at 277 (emphasis added)). It points to the fact that Congress did not intend for the EAA to ban burdens placed on the *activities* of student groups. App. 24a-25a. Finally, the court invokes *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006), in support of its conclusion that schools are entitled to regulate the membership requirements of its student groups as conduct because "the [school's] policies do not implicate any rights that Truth might enjoy under the Act." App. 27a.

This conflict is apparent despite the Ninth Circuit's denial. *Hsu* is not "readily distinguishable" on the grounds that Petitioners sought to impose

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[2] While the special concurrence mentions the right of expressive association, the court does not seek to determine whether Respondents' policies negatively impact Petitioners' expressive association rights or whether Petitioners' membership requirements are necessary to preserve or protect the content of its speech. The impact on Petitioners' speech is not relevant to the court because the concurrence concludes that Respondents are imposing a viewpoint-neutral restriction to a limited public forum. App. 35a-38a.

membership restrictions while the group in *Hsu* only imposed restrictions on its *leadership*. App. 27a-28a.

The *Hsu* court clearly recognizes that *membership* restrictions have a bearing on the content of a group's speech as reflected by its citations to *Roberts*, *Hurley, Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1988). *See Hsu*, 85 F.3d at 858-59. In fact, the court made this quite clear when, quoting *N.Y. State Club Ass'n*, 487 U.S. at 13, it recognized that an association "'might be able to show that it is organized for specific expressive purposes and that it *will not be able to advocate its desired viewpoints* . . . if it cannot confine its *membership* to those who share the same sex . . . or the same religion.'" *Hsu*, 85 F.3d at 859 (second emphasis added).

Additionally, the Second Circuit expressly considered whether the membership provisions could be considered conduct. While acknowledging that "the exclusion resembles conduct in at least one sense," the court did not rest its decision on the issue of conduct. "[C]onduct that is expressive can receive the same protection as 'pure speech.'" *Id.* at 856 n.13.

In this respect, at the very least, the Ninth Circuit's understated initial impression was correct. Its decision "is in some tension with that of the Second Circuit." *See* App. 98a-99a.

2. Definition of "Equal Access" and "Discrimination."

As for what constitutes "equal access" and "discrimination" under the EAA, the conflict is more succinctly stated although not expressly recognized by the Ninth Circuit. The Ninth Circuit adopts the view that a policy that applies to all groups cannot be discriminatory or violate the "equal access" provision of the EAA. It quotes the EAA's statutory history which it apparently interprets to mean that Congress recognized that content-neutral policies may cause "'not all student groups [to] receive exactly the same privileges.'" App. 26a (quoting S. Rep. No. 98-357, at 39 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2348, 2385).

In distinct contrast, the Second Circuit looked to both the facial neutrality of the school's non-discrimination policy *and* its effect. According to the court, this was essential because the EAA "mandates that students be given 'equal access,' not that the School's internal rules be administered uniformly." *Hsu*, 85 F.3d at 860. As noted by the court, there are many examples where a "uniform" policy results in discrimination and the denial of equal access. *Id.*

Viewed through this lens, the court concluded that the non-discrimination policy could not pass muster as "uniform" or "neutral" (in the words of the Ninth Circuit). The non-discrimination policy deprived the religious group of "the same latitude that other clubs may have in determining who is qualified

to lead the Club." *Id.* at 861. It prohibited the religious group from doing that which all other groups were entitled to do: "protect its character by restricting eligibility for leadership to those who show themselves committed to the cause." *Id.*

3. Deference Owed to School Policy.

Finally, there is the issue of what deference to afford a school's non-discrimination policy. The Ninth Circuit opinion uncritically assumes that deference is owed to schools. It does not question the necessity, wisdom, and efficacy of applying the non-discrimination policy to Petitioners. According to the court, the non-discrimination policy is reasonable because it "advance[s] the school's basic pedagogical goals," "instilling the value of non-discrimination." App. 32a. This is enough for the court.

The Second Circuit acknowledges a school's obligation to "protect[ ] the rights of other students, and for maintaining 'appropriate discipline in the operation of the school.'" *Hsu*, 85 F.3d at 862 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).[3] However, in contrast to the Ninth

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[3] Neither the Ninth nor the Second Circuit seeks to justify the non-discrimination policies under the two provisions of the EAA that allow a school to deny equal access. 20 U.S.C. § 4071(c)(4) gives schools the right to ensure that meetings "do[ ] not materially and substantially interfere with the orderly conduct of educational activities within the school." 20 U.S.C. § 4071(f) allows schools to make those decisions necessary "to

(Continued on following page)

Circuit's unquestioning acceptance of school policy, the Second Circuit analyzed whether the non-discrimination policy as applied to the religious group warded off the harms that it was intended to prevent. While recognizing the autonomy that should be afforded educators, the court also found that the non-discrimination policy could not be justified solely on the basis that discrimination is bad—the apparent conclusion of the Ninth Circuit. "[H]igh school students are subjected to discrimination and selection all the time[,]" by way of sports and grades, among other things. *Hsu*, 85 F.3d at 871. The court further noted that non-discrimination policies were intended to protect against invidious discrimination which was not at work in the case. There was no evidence of animus towards others or a desire to stigmatize. *Id.* at 868-72.

In light of the above, there is a conflict that has no means of being squared without this Court's attention. The conflict strikes at what the EAA means at its most fundamental level—what it means to provide equal access and what it means to discriminate on the basis of the "content of the speech" of a group.

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maintain order and discipline on school premises [or] to protect the well-being of students and faculty." The EAA does not permit a school to deny equal access in any other circumstance.

B. A Single, Uniform Standard Is Needed.

Currently, school officials and courts are given three choices when called on to apply the EAA. They can adopt the Ninth Circuit's view, which allows wholesale denial of group recognition. They can adopt the Second Circuit's view, which is more liberal in its reading of the EAA, but allows schools and courts to edit membership decisions based on their own sense of propriety without reference to 20 U.S.C. §§ 4071(c)(4) and 4071(f). Alternatively, school officials and courts can cast about for some third standard.

The EAA was not intended to generate this level of confusion and the delay that attends it.

1. Congress Intended the Equal Access Act to Clarify the Rights of High School Students.

Congress enacted the EAA to "extend[ ] the reasoning of *Widmar* [*v. Vincent*, 454 U.S. 263 (1981)] to public secondary schools." *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 235 (1990). Its purpose was "to clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and the free exercise of religion which accrue to public school students who desire to voluntarily exercise those rights. . . ." S. Rep. No. 98-357, at 3.

Legislators emphasized that they intended the EAA to prohibit discrimination based on speech,

associational rights, and religion. Senator Dole announced that the EAA would "clarify what should be obvious—that student groups do not shed their first amendment rights to free speech and association simply because they want to meet for religious purposes." 130 Cong. Rec. 19,243 (1984). Senator Denton, one of its authors, said that the EAA meant that "secondary school students engaging in religious speech have the same rights to associate together and to speak as do students who wish to meet to discuss chess, politics, or philosophy." 130 Cong. Rec. 19,216. And in general, denial of the right to associate was viewed as equivalent to a denial of the freedom of speech. *See* S. Rep. No. 98-357, at 24 (denying official recognition to religious groups abridges the associational rights implicit in the freedoms of speech, assembly, and petition); 130 Cong. Rec. 19,233 ("Therefore, if you and I have a right to voluntarily associate ourselves, to use the facility to hold a meeting on that subject, would the Senator want to deny that right to students in a high school?" (statement of Sen. Hatfield)); 130 Cong. Rec. 19,238 ("[T]o prohibit the use of school facilities by voluntary student religious groups on the same basis as other groups seeking to speak freely in our society is precisely contrary to the plain language of the First Amendment." (statement of Sen. Durenberger)).

The plain language of the EAA also makes clear that its purpose is to protect the freedom of speech and association to the extent provided by the First Amendment, subject only to a school's need to ensure

that meetings do not interfere with school activities, discipline, order, and the well-being of students and faculty. 20 U.S.C. §§ 4071(c)(4), 4071(f). Congress knew when it enacted the EAA that the "content" of a group's speech is measured by more than what a group actually says. It knew that this Court recognized the correlation between the content of the speech of a group and the members it selects. *See Rotary Club of Duarte,* 481 U.S. at 548 (upholding application of non-discrimination law after determining that it did not "affect in any significant way the existing members' ability to carry out their various purposes"); *Roberts*, 468 U.S. at 628 (considering whether the non-discrimination policy changed the content of the group's speech); *Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 122 (1981) ("On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions. . . ."); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (refusing to impose non-discrimination policy because "[t]he Boy Scouts has a First Amendment right to choose to send one message but not the other"); *Hurley*, 515 U.S. at 574-75 (refusing to require parade organizers to accept certain groups because forced association would appear to make speaker proponent of point of view); *N.Y. State Club Ass'n*, 487 U.S. at 12-13 (applying analysis of *Rotary Club of Duarte* and *Roberts*).

Neither the legislative history nor the plain language of the EAA reflects Congressional intent to deviate from this accepted view. *See N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) ("[I]t is not only appropriate but also realistic to presume that Congress" was aware of federal court interpretations of law and "expect[s] its enactment[s] to be interpreted in conformity with them." (internal quotation marks omitted, second and third alterations in original)). Indeed, were "content of the speech" narrowly defined to mean only those words that a group might utter, as underscored by this Court's views, the freedoms that the EAA was intended to protect would be a dead letter, something Congress could not have intended.

2. The Equal Access Act Provides the Mechanism for Refusing to Recognize Student Groups but Neither Court Applied It.

Given this, the *Hsu* court's decision to edit the leadership requirements established by the religious group stands in opposition to the wording and intent of the EAA. Neither the EAA nor the cases that the *Hsu* court used as interpretative analogs allow the judicial redacting of a group's membership requirements due to some disagreement as to their necessity. *Dale*, 530 U.S. at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

This is not to say that a school must simply accept a group or its membership criteria. The EAA allows schools to consider whether a group would disrupt the school or threaten its mission. 20 U.S.C. §§ 4071(c)(4), 4071(f). But neither the Ninth Circuit nor the Second Circuit invoked these provisions to deny entirely and edit partially the membership requirements of the student groups at issue. App. 1a-38a; *Hsu*, 85 F.3d at 857-58.[4]

In sum, the writ should be granted so that the purpose and intent of the EAA can be realized and so that schools and courts are not caught up in endless debates about its scope and interpretation.[5]

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[4] As for the issue of neutrality and uniformity, as the Second Circuit rightly concluded, a uniform or neutral policy cannot be the sole aim of the EAA. It cannot be that Congress would in other instances enact statutes seeking to prevent discrimination and thereby "proscribe[ ] not only overt discrimination but also practices that are fair in form, but discriminatory in operation," and then make an exception in the EAA. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (Title VII); *cf. Romer v. Evans*, 517 U.S. 620 (1996) (rejecting argument that law put gays and lesbians in same position as others given the impact of the law).

[5] The Ninth Circuit's limited remand provides no basis for denying or delaying review. The court remanded the case so that the district court could determine whether Petitioners would be eligible for an exemption to the non-discrimination policy that allows gender-specific groups. This exemption is provided for by law. 20 U.S.C. § 1681. It does not appear to apply to Petitioners, as the court noted. Moreover, Petitioners are seeking recognition based on religious beliefs, which has been definitively denied, and not gender. *See* App. 28a-29a & n.2.

C. This Court Should Not Wait for Another Case.

In the 25 years since the enactment of the EAA, *Amicus* has located only two circuit court cases that have weighed the rights of students under the EAA against the non-discrimination policies of schools or states.[6] This is so despite the fact that there are hundreds of thousands of high school students entering and graduating from high schools each year and the fact that every state has a non-discrimination policy.

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[6] Appellate courts have been called on to interpret and apply the EAA, but not in the manner that this case presents. *See Straights & Gays for Equality v. Osseo Area Sch.-Dist. No. 279*, 540 F.3d 911, 915-16 (8th Cir. 2008) (determining whether certain groups are curricular or non-curricular); *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 221-25 (3rd Cir. 2003) (holding that student activity period was "non-instructional time"); *Prince v. Jacoby*, 303 F.3d 1074, 1078, 1084-90 (9th Cir. 2002) (allowing religious group access as a separate "class" of club violated EAA); *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 466-67 (7th Cir. 2001) (finding that principal's decision to disallow Bible Club from including a cross in its mural did not violate EAA and was protected by EAA's "order and discipline" clause); *Ceniceros ex rel. Risser v. Bd. of Trs. of the San Diego Unified Sch. Dist.*, 106 F.3d 878, 880-81 (9th Cir. 1997) (finding that lunch period is "non-instructional time"); *Pope ex rel. Pope v. E. Brunswick Bd. of Educ.*, 12 F.3d 1244, 1249-54 (3rd Cir. 1993) (holding that groups need not be student-initiated to trigger EAA and that district admitted other non-curricular groups); *Garnett ex rel. Smith v. Renton Sch. Dist. No. 403*, 987 F.2d 641, 646 (9th Cir. 1993) (holding that EAA preempts state law regarding student groups' access to high schools).

For at least 12 of those 25 years, students in the Second Circuit have been allowed a limited set of the rights Congress promised. In the Ninth Circuit, not even this is available to students. If history is a guide, there will be few opportunities to correct the limitations imposed by the Ninth and Second Circuits, leaving over 25% of the high school students in this country without the full protections Congress sought to provide.[7]

Nor is it likely that a spate of new cases will crop up. This Court has long recognized that, faced with a decision-making body that has wide authority to grant access to a forum, people will naturally censor their preferred form of expression to avoid being denied access. *See, e.g., City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).

In addition, the EAA is intended to protect a temporally transient group of people who this Court and Congress have recognized are not fully adult. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995); *cf.* 20 U.S.C. §§ 4071(c)(4), 4071(f). It is little wonder that there are not more cases of this type. Such challenges outlast a student's high school

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[7] As of 2007, there were 23,436 public secondary schools in the United States educating over 15 million students. Thomas D. Snyder, et al., *Digest of Educational Statistics 2008* at 15, 19 (March 2009). Over one quarter of the total enrollment is within the Second and Ninth Circuits. *Id.* at 62-63 (4,297,345 students in public secondary schools in the states and territories comprising the Second and Ninth Circuits as of fall 2006).

years and cast them in the role of a non-conformist discriminator. Few would willingly accept this mantle.

III. CONCLUSION

For the foregoing reasons, *Amicus* respectfully request that this Court grant Petitioners' writ of certiorari.

Respectfully submitted,

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